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PREFACE

THIS volume contains the weekly public lectures on Current Legal Problems delivered in the Faculty of Laws at University College, London, during the Session 1951–1952, and Lord Justice Denning's Presidential Address to the Bentham Club.

Once again, the contributors, publishers and printers have equally assisted in the speedy publication of this volume. We should like to thank them for this co-operation, and also Mr. L. C. Green, the Assistant Editor of this volume, for having read the proofs and for having compiled the Tables of Cases, Statutes and Treaties and the Consolidated Index to volumes 1 to 5.

THE EDITORS

University College, London
March, 1952.

I

THE NEED FOR A NEW EQUITY

The Rt. Hon. Sir Alfred Denning

Every student knows what equity is. It arises out of the tendency of all law to become rigid. The rules of law, when enunciated by legislators or judges, are usually founded on reasons which appear satisfactory at the time. Once these rules are given the force of law, however, they must be obeyed for their own sake, and not for the goodness of the reasons which prompted them. No society can permit its members to disobey its laws simply because they disapprove of the reasons for them. The rule therefore becomes the important thing, not the reasons for it. In the course of time the reasons may cease to be valid: but the rules remain binding. New days may bring the people into new ways of life and give them new outlooks: and with these changes there may come a need for new rules of law, to control the new order and to reflect the new outlook. The old rules must then be modified or else the society itself will stagnate. This truth was observed and well stated by Sir Henry Maine ninety years ago: 'Social necessities and social opinion are always more or less in advance of law. We may come indefinitely near to the closing of the gap between them, but it has a perpetual tendency to reopen. Law is stable; these societies we are speaking of are progressive. The greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed'.

The gap can be closed, as Sir Henry Maine observed, by three means: first by fictions, secondly by equity, thirdly by legislation. The point I wish to make in this address is that in modern England we have exhausted all these means of filling the gap.

1. *Fictions.* We are much too realistic today to have recourse to fictions. Our forefathers used to create new causes of action in tort, or in restitution, by inventing a fiction of a promise and labelling it a cause of action in contract. In order to give an efficient remedy for the recovery of land, they used to create

fictitious persons like John Doe and Richard Roe and let them make fictitious leases. And so forth. All that has gone now. The fictions became dark curtains which obscured realities. They have been torn aside by a man whose insight penetrated many dark places. I refer to Lord Atkin who said of fictions: 'When these ghosts of the past stand in the path of justice clanking their medieval chains, the proper course for the judge is to pass through them undeterred'.[1]

2. *Equity.* We are much too modern and sophisticated to believe in a law of nature; and that is all that equity was. Whether you take Roman equity as administered by the prætors, or English equity as administered by the Lord Chancellor, in each case equity invoked the principles of natural justice. Equity claimed that these principles had priority over all the laws then existing: and therefore that these principles could be prayed in aid to mitigate their harshness or to soften their rigidity. Thus although a man might be entitled at law to use his land as he pleased, nevertheless equity would not let him do so if it would be contrary to good faith. So it invented the trust. Although a man might be entitled at law to insist on the binding force of a contract, nevertheless equity would not allow him to do so if it had been induced by a misrepresentation, even though it was an innocent misrepresentation. In the days of Lord Nottingham and Lord Hardwicke equity was very fluid and adaptable but in the hands of Lord Eldon it became rigid and technical: and it has remained so ever since. Harman, J., said recently that 'Equity is presumed not to be past the age of child-bearing'. But I do not think it has any child now living which is not at least 100 years old. I would like to tell you of three cases which show how rigid equity has become.

The first, of course, is the case about Caleb Diplock's will. Many years ago the equity judges, under the influence of Lord Eldon, laid down the rule that if a man by will left his property to trustees to distribute to 'charitable and benevolent purposes' it was a valid bequest, but if he left it for 'charitable or benevolent purposes' it was bad; and not only bad, but incurably bad. This proved to be a trap for at least two unwary solicitors and may be for many more. In 1939 a solicitor who had fallen into the trap sought to blame it on to the typist. He said that, in drawing up the will, he dictated the word 'and' but the typist took it down as 'or', and he didn't notice it when he read it through, nor of course did his unsuspecting client who knew nothing of the rules of equity. The President of the Probate Court, Lord Merriman, was ready to help to extricate them from the trap by striking out the void 'or'; but the Court of Appeal said that the Probate Court must not interfere with the will.[2]

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[1] *United Australia Ltd.* v. *Barclays Bank* [1921] A.C. 1, at p. 29.

This ruling came to the notice of a solicitor in Australia who saw in it an opportunity for challenging the distribution of the Diplock money. It arose in this way: the solicitor who drew up the will of old Caleb Diplock had fallen into the same trap, and the trustees had actually distributed a quarter of a million pounds to charities which were both charitable *and* benevolent. But the will contained the deceptive word 'or'. It said that the trustees were to distribute the fund for 'charitable *or* benevolent purposes'. If the word 'or' had been omitted, or had been 'and', the bequest would have been good. But because the word 'or' was there the House of Lords held that the bequest was incurably bad. No remedy was available by means of rectification or by severance or by any doctrine of *cy-près*. By this ruling the intention of the testator was utterly defeated. It was held that none of the money ought to have been paid to the charities at all. It ought to have gone to Caleb Diplock's first cousin once removed who was living in Australia and of whom he had never heard. No one can doubt that if Caleb Diplock or his solicitor had any idea that that might happen they would have struck out the word 'or'.[3] But that is not the end of the story. The first cousin once removed claimed the moneys back from the charities. Some of them had it still in the bank, so they of course had to pay it back. But others had spent it on building new hospital wards or repairing old ones or in paying their working staff, so they simply had not the money to pay back. On the faith of the bequest being valid, they had radically changed their position and, in point of natural justice, they would seem to have had a good equity to resist repayment. But nevertheless the House of Lords held that the charities personally must pay to the first cousin once removed every penny they had had. The decision was based on a ruling

[2] *Re Horrocks* [1939] P. 198.

[3] *Re Diplock* [1941] 1 Ch. 267; [1944] A.C. 341.

of Lord Nottingham 300 years ago when equity was still an infant. It was held that the first cousin once removed had an equitable right which was not to be denied. To any one who is not a lawyer it must seem strange that equity should be invoked to do such injustice. It just shows how rigid equity has become.[4]

Take another case, *Thompson* v. *Earthy*.[5] A husband deserted his wife and she claimed maintenance from him before the magistrates. He promised to let her stay in the house and on the faith of that promise the magistrates ordered him to pay much less maintenance than they would otherwise have done. He then sold the house over his wife's head to a purchaser who, it was assumed, bought it with full knowledge of all that had taken place before the magistrates, including the husband's promise. Nevertheless it was held that the purchaser was entitled to disregard the promise made to the wife and to turn her out of the house. If she had had an equitable interest there would be no need to register it in the Land Register because she was in actual occupation; and that gave notice of her rights. She was turned out because she had no interest of a kind hitherto known to equity. The judge said: 'I decline to declare the existence for the first time of a suggested equitable interest for which there is no previous authority whatever'.

Another recent case is *Armstrong* v. *Strain*,[6] where a man built a bungalow on shifting soil. He underpinned it several times but it remained very unsafe. He then put it into the hands of an estate agent for sale but told him nothing of the danger. The estate agent told a proposed purchaser that any building society would lend £1,200 on it because that represented a small percentage of the value. Thereupon the plaintiff bought the bungalow. A short time later the bungalow subsided beyond repair. Neither the owner nor his agent was guilty of fraud but they were between them guilty of an innocent misrepresentation. It was held that the buyer had no remedy. It is a rule of equity laid down over 100 years ago that, once a contract for sale of a house is completed by conveyance, there can be no rescission for innocent misrepresentation. This rule is so well established that in *Armstrong* v. *Strain* counsel for the plaintiff did not even claim rescission for innocent misrepresentation. Yet no one can doubt that as a matter of justice the buyer should have been allowed to rescind. Lord Justice Birkett said there was great force in the plea that the law should be able in some way to give the plaintiff redress, but there was none.

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[4] *Ministry of Health* v. *Simpson* [1951] A.C. 251.
[5] [1951] 2 K.B. 596.
[6] [1952] 1 T.L.R. 82.

Instances could be multiplied of the failure of equity to adapt itself to modern needs. Take the case of a contract for the benefit of a third party. Nearly every other country in the world now gives the third party a cause of action. But in England we are still bound by the rule of law that no one but a party to a contract can sue upon it. The injustice of this rule is seen by what happened in *Miller's Agreement*. A man sold his business and in return the purchaser covenanted to pay to the seller an annuity for his life and after his death an annuity to his daughter for her life. The father died and the daughter was held to have no right to sue for her annuity. There can be little doubt that in the wise and just hands of Lord Hardwicke the Court of Equity would have found a remedy. Lord Hardwicke was ready in all these cases to hold there was a trust in favour of the third party and thus to give a remedy. The conception of a trust has, however, since his time been narrowed and canalised so as to require as an essential element a positive intention to create a trust.[8] By this narrowness of outlook equity, to use Professor Hanbury's phrase, is throwing away 'the weapon it has itself forged'. Even section 56 of the Law of Property Act, 1925, which was wide enough in its terms to permit a remedy, has been 'construed in a very conservative manner' and so the courts missed an opportunity of modernising the law which the legislature offered them.[9]

Courageous efforts are now being made by some judges to remedy the situation. Thus Vaisey, J., tried a case recently where a man who had mortgaged his house to a building society sold it to a purchaser. In the deed of transfer the purchaser covenanted that he would pay the future instalments to the building society. The building society was not a party to the deed of transfer, but Vaisey, J., held that the building society could enforce the covenant by direct action against the purchaser.

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[7] [1947] Ch. 615.

[8] *Vandepitte's Case* [1933] A.C. 70.

[9] *White* v. *Bijou Mansions* [1937] Ch. 610, at p. 625.

He held that in this respect the deed of transfer was a deed poll; and that according to the old law a deed poll can be enforced by a person who is not a party to it. The decision is much to be welcomed but it would appear to be a recourse to an archaic distinction between a deed poll and a deed *inter partes*—so as to give a remedy which equity was powerless to give.[10] Similar bold action was taken by Danckwerts, J., in a case where a company was in possession of land and an option was given to the company to buy the freehold. The option was contained in an agreement made with the directors and not with the company; but nevertheless Danckwerts, J., held that the company was entitled to enforce it. He did this by praying in aid section 56 of the Law of Property Act, 1925.[11] Whether these two cases herald a new approach on this subject I do not know. They are too special in their nature and in their reasons to provide any clear guide to the future.

I will not stay to give you further instances of the rigidity of modern equity. I will turn to the place of legislation in filling the gap.

3. *Legislation.* Parliament is much too busy to do all it should for law reform. Crisis follows upon crisis; and one major debate on another major debate. Foreign policy, economic affairs, defence and social services claim the attention of the legislature to such an extent that there is no time for them to consider the injustices caused by decisions of the courts of law. Even if they do find time, they can never remedy the injustice in the case itself. They cannot, or at any rate should not, legislate retrospectively. The aggrieved party must suffer under the injustice, and content himself with the reflection that his case has brought it to light. Then Parliament can remedy it for others in the future, if it can find time to do so, but it cannot remedy it for the original sufferer.

How different is this from the operation of equity in its golden age! The Lord Chancellor did not wait for the injustice to be done before he intervened. Sir Thomas More led the way. He used to issue injunctions against proceedings in the courts of law. He did this before the injustice was done and thus prevented them from doing it. Later Lord Chancellors followed

[10] *Chelsea Building Society* v. *Armstrong* [1951] 1 Ch. 853.
[11] *Stromdale and Ball* v. *Burden* [1951] 2 T.L.R. 1192.

his example and in due course they laid down principles of equity to be followed in subsequent cases. For 200 years the Lord Chancellors used a wide discretion to do what was just. They did not wait till the damage was done.

Look now at legislative action. Parliament does not act until the sky is heavy with complaints. Case after case must disclose the injustice of the law; judges must comment on it; representations must be made about it. If these are loud and long enough, a Committee may be appointed to consider it. This Committee may report in favour of an alteration of the law, but still there may be no time for Parliament to make the alteration. At any rate there may be no Government time for it, and the only hope is that a private member may take it up. I do not deny that much good has been done by Parliament in recent years. The old doctrines of *actio personalis moritur cum persona,* of common employment, and contributory negligence have been abolished root and branch. Common informers have been exterminated. The law as to frustration of contract has been made more just. The law of libel is in fair way to being amended. All this is well done. It is not the results which I criticise. It is the slow and uncertain machinery by which the results are achieved. After a long wait Parliament can deal with great injustices which repeat themselves, but not with small ones which occur infrequently; and it can never deal with them retrospectively.

Many are the cases in the books where judges have said 'I know this decision is unjust, but such is the law and it is not for me to alter it. If it is to be done, it must be done by Parliament'. Yet nothing is done. The subject is too small to warrant the time of Parliament being spent on it. Parliament has much bigger things to do. So the injustice remains. A good illustration is the rule that no one but a party to a contract can sue on it. A strong Committee in 1937 recommended that a contract expressly made for the benefit of a third party should be enforceable by the third party. But nothing has been done by Parliament to remedy the law on the point. The injustice does not occur often enough to warrant their attention.

I have considered the three ways of filling the gap which Maine suggested, fiction, equity and legislation. If they are exhausted where is a new means to be found? It is at this point that I begin to regret the fusion of law and equity. We have now no call upon natural justice. We have one system of courts and one system of law. We have a Lord Chancellor but we have no over-riding equity. The Courts of Chancery are no longer courts of equity. They have no jurisdiction to mitigate harshness or to soften rigidity. They are as fixed and immutable as the courts of law ever were.

Sir William Holdsworth said once that the separate systems of law and equity still live 'in the separate intellectual cast which they impose upon those who study and apply them'. If he meant by this to suggest that the Chancery lawyers have a greater reserve of natural justice than the common lawyers, I cannot agree with him. The Judicature Acts and Property Acts have had a very definite effect on the work of the Chancery Division. It has become much concerned with dealings in land, and devolution of estates. In those branches of the law certainty is, quite rightly, of paramount importance. It does not matter so much what the rule is, so long as it is certain. People who deal in property do not want to buy lawsuits or to inherit them. They want to know exactly what will happen if they use such and such words, and exactly how to provide for such and such a contingency. In this branch of the law words are the masters who must be obeyed. It was the same with the old real property law of the common lawyers with its shifting uses and contingent remainders and so forth. Our real property law was as devoid of moral concepts as mathematics. Rights and wrongs did not enter into it. Nor the redress of grievances. Only words and rules: and logical deductions from them. In those early days land was the most important kind of property; and the common lawyers were so absorbed in land problems that they approached other problems in the same frame of mind. They looked for certainty, and gave justice a second place. In their hands the law of contract and torts tended to become as technical and rigid as the law of property. In order to have a cause of action the plaintiff had to fit his complaint into one of the established forms of action, or else he had no remedy. It was only by the efforts of great judges like Holt and Mansfield, Blackburn and Willes that the common law managed to keep itself free from these restricting bonds.

The Judicature Acts have had a beneficial effect on the

Queen's Bench Division. It is not so much concerned with the transfer of property as with the redress of grievances. It gives compensation for wrongs done and injuries inflicted. In these branches of the law justice is at least as important as certainty, and probably more important. Moral concepts play a large part. The classic judgment of Lord Atkin in *Donoghue* v. *Stevenson* starts with the Christian precept 'Thou shalt love thy neighbour as thyself'. He says, 'The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply'.[12] The truth is that the plain man can see well when a wrong has been done; and he looks to the courts of justice to afford a remedy for it. If the judges should say, 'We admit that a wrong has been done but cannot give you a remedy', that is a tacit admission that the law is failing to fulfil its function. It is failing to do justice. The common lawyers seek to avoid that reproach. New days bring new wrongs, or wrongs of a new kind, and the law must be developed so as to give redress for them.

The law, as I see it, has two great objects: to preserve order, and to do justice; and the two do not always coincide. Those whose training lies towards order, put certainty before justice; whereas those, whose training lies towards the redress of grievances, put justice before certainty. The right solution lies in keeping the proper balance between the two. But how is this to be done? The House of Lords are the persons to perform the task; and they have on occasion done it in notable fashion. Thus in the case of *Donoghue* v. *Stevenson* Lord Atkin, with the help of two great Scots lawyers, did justice by creating a new tort of negligence notwithstanding the protests of two great Chancery lawyers who wished for no change. Subsequent events have proved that Lord Atkin and his two Scots colleagues were right and that the fears of the Chancery dissentients were groundless. That case shows, however, the defects of our system. Just change the composition of the House of Lords by one member and the development of English law would have been retarded for generations: because the House of Lords is bound by its own decisions.

The House of Lords has great responsibilities: and it is only right that it should feel its way cautiously before making any change in the law. The recent case of *London Graving Dock* v. *Horton* [13] shows how difficult it is to keep the right balance. The decision there was by three to two in favour of maintaining the rule about invitors laid down by Willes, J., in *Indermaur* v. *Dames* [14] instead of bringing it into a general conception of negligence. This may well be the right decision: but we have to recognise that, even if it was wrong, it cannot be altered. I have often wondered whether the House were wise to impose on themselves the limitation that they are bound by their own decisions: but it is too late to do anything about it.

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[12] [1932] A.C. 562, at p. 580.

I repeat again: Where is the new equity to be found? Not in the judges, for they are forbidden to legislate. Not in the House of Lords, for they are bound by their own mistakes or, to put it more accurately, bound by their past decisions even though they have become out of date. It is, I think, to be found in the new spirit which is alive in our universities. There must rise up another Bentham to expose the fallacies and failings of the past and to point the way to a new age and a new equity. We stand at the threshold of a new Elizabethan era. Let us play a worthy part in it.

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[13] [1951] A.C. 737.

[14] (1866) L.R. 1 C.P. 274.

2

THE DIRECTOR AS TRUSTEE

G. W. KEETON

THE extent to which a director of a commercial company can be regarded as a trustee is an interesting inquiry for three principal reasons: (1) it is the point at which commercial practice touches equity practice, and the two jurisdictions might be expected to have widely differing outlooks upon major problems; (2) the conception of the director as a trustee is a modern one, having been developed mainly since the passing of the first Companies Acts in the middle of the nineteenth century; and (3) the differing outlooks of the Courts of Common Law and the Court of Chancery upon the position of the director was one of the reasons leading to the fusion of the administration of Law and Equity by the Judicature Acts, 1873–1875.[1]

It is probably due to the first reason that the extent to which the ordinary obligations of a trustee prevail against a director is a matter of some uncertainty, and that the attitude of the courts has fluctuated considerably in the course of a century. The old joint stock company, created either by statute or royal charter, had undergone very considerable development in the eighteenth century. By two Acts of 1834 and 1837 the Crown was empowered, in suitable cases, to restrict the liability of members even of unincorporated trading companies to a fixed maximum for each share. Such a privilege could only be enjoyed where a registered deed of partnership existed, in which the capital was divided into specific shares. The necessity for the registration of the deed of partnership was the beginning of the Register of Joint Stock Companies, and from this point the transition to the modern limited liability company was continuous. In 1844 and 1845, six statutes dealt with various types of company, and for the first time the limited company, with its Memorandum and Articles of Association, emerges. So also do many of the most characteristic features of modern company practice, including the appointment of directors, the general and extraordinary meetings of shareholders, and the preparation and audit of an annual balance sheet. Finally, two statutes passed in 1855 and 1856 introduced the great principle that any group of persons engaging in trade or commerce (other than insurance and banking) could be incorporated with limited liability on satisfying certain specified requirements. In 1862 the first consolidating statute was passed.

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[1] Holdsworth, *History of English Law*, Vol. 1, p. 638.

If the provisions of these successive Acts are considered, it will be found that, whilst the legislature was carefully exploring the possibilities of such a potent instrument for industrial development as the limited liability company undoubtedly was, it was also seeking to preserve, as far as possible in the changed circumstances, some of the main features of the older joint stock company. The Court of Chancery had a similar outlook. For example, the third edition of John William Smith's *Mercantile Law* was published in 1866, and the reader of that treatise will find that, even at that date, the learned author devotes no less than forty pages to joint stock companies, under which he discusses both the older joint stock company proper, and the later statutory creation. The author obviously regards the principles governing the former as applicable, *mutatis mutandis,* to statutory companies. That being so, his observations on the duties of directors of joint stock companies are of especial interest. He says:

'As the management of the company is confided by the deed of settlement to the directors and their agents, and the bulk of the shareholders must necessarily continue passive, the courts of equity are very strict in enforcing the due execution of the trust reposed in those functionaries. In *Wallworth* v. *Holt,*[2] the affairs of a joint stock bank having fallen into a very disastrous condition, the Lord Chancellor entertained a bill against the public officer, directors and trustees, filed by some of the shareholders on behalf of the rest, praying for an account of the assets, and a due application of them to the liabilities. The authority of this case has been recognised, and the rule laid down by it acted upon in several recent instances, in some of which an attempt has also been made to extend the relief to a decree for the dissolution of the company, but the courts have refused to entertain a bill for such a purpose, without making

[2] 4 M. & Cr. 619.

the whole of the members parties to the suit. Where a projected company has never been brought into actual operation, the persons who have advanced money on the faith of the completion of the undertaking may maintain an action to recover it. And equity will give effectual relief where a scheme turns out a mere bubble, concocted in fraud '.[3] In this extract, Smith bases his observations upon the fact that in the company formed by deed of settlement, the directors were trustees in the full sense, the firm's property being vested in them in that capacity. At first, it was assumed that the directors of a statutory company were in a similar position.

Unfortunately, the promise of these earlier decisions was not fulfilled, and the late Professor Jenks, in his lively *Short History of English Law* commenting on the failure of Equity in the nineteenth century to remedy new abuses, wrote:

' The second example is that of the company promoter or director, who shields himself from liability towards his real beneficiaries, the shareholders, behind the artificial protection of that purely legal entity, the company. With a reasonable application of equitable principles, the monstrous doctrine: that " the directors of a company are not trustees for individual shareholders ", would never have been adopted; and directors who are secretly negotiating a profitable sale of their company's assets would not be allowed to go about buying up shares with a view to profiting at the expense of their own shareholders. The Court which decided *Keech* v. *Sandford* [4] would have made short work of such a claim '.[5]

These observations were patently written with the well-known case of *Perceval* v. *Wright* [6] freshly in the author's mind. In that case the facts were very much as summarised in Professor Jenks's observations, and the Court of Appeal showed great tenderness in protecting the chairman of the company, who had purchased the holdings of some of the shareholders. Swinfen Eady, J., flatly rejected the suggestion that the directors could be held to be trustees for individual shareholders, and was at considerable pains to show how difficult it would be if directors were compelled to disclose pending negotiations. It might perhaps have been thought that one way to avoid embarrassment would be for directors to refrain from buying shareholders' interests when they were on the eve of concluding a profitable arrangement for the company. Perhaps they might even have suggested to shareholders that they should hold on to their shares a little longer. Such a way out does not appear to have suggested itself to the learned judge, however, and he contented himself with saying :

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[3] *Mercantile Law,* 3rd ed. (1866), pp. 131–132.

[4] (1726) 2 Eq.Cas.Abr. 741.

[5] 1934, p. 240.

[6] [1902] 2 Ch. 421. It is, of course, possible that the company itself might have recovered a profit made by directors as a result of the misuse of confidential information.

' The sound rule appears to be that shareholders must be taken to know, and are fixed with knowledge of, the powers conferred by the constitution of the company upon the directors, and there is no more reason for the shareholders to assume that the directors were not negotiating for a sale of the property, if they have a power of sale, than to assume, if not stated, that they were not exercising any other powers conferred upon them by the constitution of the company '.

If we substitute for ' director ', the word ' trustee ', and for ' shareholder ' the term ' *cestui que trust* ' the contrast is startling. Demonstrably a different social outlook has prevailed in the case of directors, as compared with that applicable to trustees. Nevertheless, if we turn to one of the early decisions on the responsibility of directors, *Aberdeen Railway Company* v. *Blakie Brothers*,[7] we find Lord Cranworth, L.C., saying :

' A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract entered into '.

Evidently by the end of the century this principle, which is in the direct line of descent from the equitable principles enunciated by Lord Hardwicke in *The Earl of Chesterfield* v.

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[7] (1854) 1 Macqueen 461.

Janssen,[8] has been confined within narrow limits. Something will be said shortly of the reason for this miscarriage of Equity. The principle, indeed, owes its origin to Lord Hardwicke, for in *Charitable Corporation* v. *Sutton,* decided in 1742,[9] he had held that committeemen (that is to say, directors) of a chartered corporation, who had misapplied its funds and broken its by-laws were liable on the footing of trustees for breach of trust. Such committeemen under the deed of settlement would have the property vested in them as trustees in the full sense. It is also significant that in *York and North Midland Railway* v. *Hudson,*[10] a case decided the year before *Aberdeen Railway Company* v. *Blakie Brothers* reached the House of Lords, Romilly, M.R., had held directors who had wrongly applied the funds of a company liable on the footing of trustees. The facts of this case are exceedingly interesting. Hudson was the chairman and the dominating influence in the railway company. His efforts were largely responsible for an extension of the company's running powers. To finance developments, additional capital was called for, and Hudson induced the shareholders at a general meeting to place a large number of shares 'at the disposal of the directors'. That was, in fact, equivalent to placing them at his own disposal, and he placed them on the register in the name of a nominee, subsequently reselling them at a profit. The Master of the Rolls ordered an account of the proceeds of the sales of these shares, observing:

'The directors are persons selected to manage the affairs of the company for the benefit of the shareholders. It is an office of trust, which, if they undertake, it is their duty to perform fully and entirely. A resolution by the shareholders, therefore, that shares or any other species of property should be at the disposal of the directors, is a resolution that it shall be at the disposal of the trustees, in other words, that the persons entrusted with that property shall dispose of it within the scope of the functions delegated to them in the manner best suited to benefit their *cestuis que trust.* To construe these words as importing a gift to the directors for their individual advantage, or as investing them with a secret and irresponsible trust, would, in my opinion, be impossible unless they were coupled with clear and unambiguous expressions to that effect. In the absence of any such expressions, not only the obligation of discharging the duty lies upon persons accepting the trust, but also the further obligation of accounting for their discharge of it to their *cestuis que trust* whenever required '.

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[8] (1750) 1 Atk. 301; 2 Ves.Sen. 125.
[9] (1742) 2 Atk. 400.
[10] (1853) 16 Beav. 485.

In *Hudson's Case* it was the company which proceeded against the director, and towards the company the director can be regarded as a trustee, to be proceeded against on that footing. Thus, *Hudson's Case* is an illustration of the observations of Lord Cranworth in *Aberdeen Railway Company* v. *Blakie Brothers*. For the same reason, it was held that directors, being trustees, could not claim the benefit of the Statutes of Limitation, *even though they were also agents of the company,* before the passing of the Trustee Act, 1888.[11] Such a position is effective where there are officials or directors willing and able to proceed against defaulting directors. Where these do not exist, the narrowness of the protection, due to the exclusion of shareholders from the status of *cestuis que trust* becomes apparent.

It is certainly the case that before the passing of the nineteenth century Companies Acts, the directors of joint stock companies had been regarded as trustees in the wider sense. Indeed, such a situation was inevitable, for before the Acts of 1844–1845, joint stock companies were not incorporated, unless a statute or royal charter conferred this privilege. Accordingly, the strict antithesis between ' trustee for the company ' and ' trustee for the shareholders ' which appears in the later decisions could not arise. However, there exists one important distinction between a trustee in the ordinary sense and a director of a modern limited liability company. The trustee was the owner of the trust property. A director of a statutory company does not have the ownership of the company's property vested in him as his predecessor under a deed of settlement did. Such a situation is not necessarily fatal to the existence of fiduciary obligations, as the relationship of solicitor and client shows. Still, it does emphasise that from the standpoint of the Common Law Courts, the status of the director was that of agent for the company, and an agent's responsibilities are not necessarily those of a trustee. Historically, this seems to have been the starting-point of the modern tendency to reduce progressively the responsibilities of the director. The Court of Chancery started by exacting high standards from him. Under the influence of the Common Law Courts they relaxed their standards, and eventually they went to extreme lengths to relieve the director from responsibility, at any rate towards his shareholders. In this instance, the Judicature Acts appear to have operated in reverse. Equitable principles gave way to those applied at common law.

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[11] *Flitcroft's Case* (1882) 21 Ch.D. 519.

If the very numerous decisions on the position of directors given between 1860 and 1885 are examined, the difficulties of these differing attitudes of the two jurisdictions are manifest. So also are the efforts made to resolve them. These can be traced in large measure to the judgment of Lord Cairns (whilst Lord Justice of Appeal) in *Ferguson* v. *Wilson* [12] where he points out that where shareholders are proceeding against directors for misapplication of the company's assets, then the directors are in the position of trustees and can be proceeded against on that footing. This was repeatedly reaffirmed, more especially by Jessel, M.R., in *Re Forest of Dean Company,*[13] and by that great master of company law, Lord Lindley, in 1894, when still a member of the Court of Appeal, in *Re Lands Allotment Co.,*[14] where he says:

'Although directors are not, properly speaking, trustees, yet they have always been considered and treated as trustees of moneys which come to their hands, or which is actually under their control, and ever since joint stock companies were invented directors have been held liable to make good moneys which they have misapplied, upon the same footing as if they were trustees'.

Thus, the assets are regarded as a trust fund, which, if misapplied, can be followed into the hands of any one taking with knowledge of the misapplication.

Where directors act on behalf of the company, however, they must be regarded as agents. In such cases, as Lord Cairns pointed out in *Ferguson* v. *Wilson,* 'they are merely agents of the company. The company itself cannot act in its own person, for it has no person, it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent, for wherever an agent is liable those directors would be liable. Where the liability would attach to the

[12] (1866) L.R. 2 Ch.App. 77.
[13] (1878) 10 Ch.D. 450.
[14] [1894] 1 Ch. 616.

principal, and the principal only, the liability is the liability of the company'.

Even in agency cases, however, there may be a fiduciary relationship between the director and the company. Equity has merely acquiesced in the exclusion of a further duty towards the shareholders individually—a situation which, in reality, is a logical inference from the fact of incorporation. The extent of the responsibility of the director to the company is clearly brought out in two cases which are reported consecutively in the reports—*Cooks* v. *Deeks*[15] and *Jacobus Marler Estates* v. *Marler*.[16] In the former, the Privy Council compelled the directors of a Canadian company to restore to the company the benefits of contracts made by them personally, by diverting contracts formerly enjoyed by the company, and it further affirmed that the transactions could not stand even though a shareholders' resolution had ratified the contracts, inasmuch as the directors controlled a majority of the votes. This is an illustration of the general principle that in Equity an agent cannot, without the consent of his principal, given with full knowledge of the material facts and without undue influence on the part of the agent, retain any profit from a transaction entered into by him as agent.

It will be evident, therefore, that in handling the assets of a company, directors are accountable on the footing of trustees strictly, in cases of active misapplication (for example, for purposes not permitted by the memorandum of association). In respect of contracts entered into by them in respect of the company's business, they are regarded as agents standing in a fiduciary position to the company. Where, however, the courts have failed to apply the trust concept to directors is (1) in respect of individual shareholders, as was apparent from the decision in *Perceval* v. *Wright*; and (2) in respect of the degree of care and business prudence expected from directors in the discharge of their duties. It was here that the failure to apply normal equitable standards was most apparent, as will be evident from one or two illustrations which will be discussed shortly. One may speculate on the reasons for this striking attitude. A Marxist might say that it was due to the entry of the upper classes into commerce through the convenient device of limited liability. A less biased sociologist might suggest that it was due to the anxiety of the courts not unduly to hamper business men in their normal pursuits. However that might be, the results were sometimes startling. One further point which may perhaps be made is that, however low might be the standards prescribed by the Court, those prescribed by commercial practice were substantially lower. The law did at least prescribe *some* standard of care for the company director. The articles of particular companies frequently attempted to relieve him completely of responsibility for what he did. No doubt this had something to do with the attitude of the courts. It would have been somewhat ludicrous, or even hypocritical, for courts to lay down strict standards of duty for directors, when company articles regularly allowed them to evade any standards prescribed by the Court.

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[15] (1916) 85 L.J.P.C. 161.

[16] (1916) 85 L.J.P.C. 167.

One other circumstance forcibly presents itself to those who examine the attitude of the courts towards directors. Judges were evidently impressed by the fact that a directorship was a very part-time occupation. A business man is a busy man, and if he is, in addition, the director of several companies, then the amount of time he can devote to the affairs of any single company is of necessity very limited. Conversely, if the director is of the guinea-pig variety—if, for example, he is a distinguished nobleman with wide social and sporting activities—then his attention to business may be fleeting, and his abilities limited. Accordingly (the decisions suggest) he is not to be victimised, if the consequences of his somewhat fugitive appearances in the board-room are not always happy. Once again the contrast between this attitude and that of a Court of Equity towards a trustee in the strict sense is striking.

It is to be regretted that a full-scale sociological inquiry into the working of our company law during the hundred years of its existence has not yet been undertaken. Various writers, however, have at different times touched upon particular aspects of this wide subject. Thus, Mr. H. B. Samuel in *Shareholders' Money,* written nearly twenty years ago, shortly after the *Kylsant Case,*[17] devoted an important part of his highly-interesting book to an analysis of some of the best-known decisions on the liability of company directors in their social background, from which some interesting facts emerged. Thus, by analysing the 1932 edition of the *Directory of Directors,* he found that a total of 654 English peers held between them 562 directorates. Marquises, oddly enough, were the most popular, since for a total of twenty-five marquises there were thirty directorates. These figures completely excluded from consideration any peers who inherited directorates in family businesses, as well as peers who actually worked in City firms. The consequences of appointing to boards persons of eminence, whose acquaintance with the affairs of the company was slight, were sometimes disastrous.

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[17] [1932] 1 K.B. 442.

Actions by shareholders against directors for mismanagement have usually included allegations that the directors have been guilty either of fraud, negligence, or misfeasance. Fraud, as is well known, was the substance of the action in *Derry* v. *Peek.*[18] It was in consequence of the decision of the House of Lords in this case that the Directors' Liability Act, 1890, was passed, and the provisions of that Act, imposing a special statutory responsibility for statements in a company prospectus, were incorporated into later Companies Acts. It is no part of the purpose of this lecture to analyse the definition of fraud given by the House of Lords in this case. What is of direct relevance, however, is the fact that the members of the House of Lords on that occasion showed no disposition to apply the principles of fraud as developed by Courts of Equity in respect of fiduciary relationships to the office of company director. Having absolved the directors of the Plymouth, Devonport and District Tramways from the stigma of common law fraud in this case, they regarded their task as complete. Indeed, Lord Herschell, in his speech, expressly stated that actions for abuse of fiduciary relationships had no application to cases of the kind before the Court.

There is, however, one further aspect of *Derry* v. *Peek* which is not without interest in the present discussion. Lord Bramwell noticed that the directors of the Tramway Company had received their directors' shares from the promoter, who was intending to sell the enterprise to the company. Commenting on this, Lord Bramwell said:

'It is wonderful to me that honest men of ordinary intelligence cannot see the impropriety of this. It is obvious that the contractor can only give this qualification because he means to get it back in the price given for the work he is to do. That price is to be fixed by the directors who have taken his money. They are paid by him to give him a good price, as high a price as they can, while their duty to the shareholders is to give him one as low as they can. But there is another thing. The public, seeing these names, might well say, " They are respectable and intelligent men who think well enough of this scheme to adventure their money in it; we will do the same ", little knowing that those thus trusted had made themselves safe against loss if the thing turned out ill, while they might gain if it was successful '.

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[18] (1889) 14 App.Cas. 337.

Plain hints of this kind, however, were unheeded. The supply of guinea-pigs was apparently inexhaustible. It is only necessary to consider from this standpoint *Re Cardiff Savings Bank: The Marquis of Bute's Case*,[19] remembering Mr. Samuel's observations on the ratio of marquises to directorships. The Cardiff Savings Bank was formed in 1819, and was reconstituted under the Trustee Savings Bank Act, 1863, in that year. It suspended payment with heavy liabilities in 1886, and a liquidator was appointed. The subsequent proceedings showed that loss had resulted from the irregular conduct of the bank's business by its trustees and managers. The question in the present case was whether the Marquis of Bute shared responsibility for the loss resulting from the irregularities. The marquis was the (unpaid) president of the bank, and it was shown that he had attended no meetings of its governing body for seventeen years. Nevertheless, it was held that he had committed no actionable breach of duty. Stirling, J., in this case preferred to minimise the marquis's functions as trustee, and said that the standard of care to be shown by him could not be placed higher than that of a company director who, he added, must exercise care at the meetings at which he was actually present, but who owed no duty to attend any specific meeting, or even any company meeting at all! This ' intermittent ' theory of a director's duties has frequently been approved in later cases. How far it might be pressed was indicated in the concluding remarks of Stirling, J., in his judgment in *The Marquis of Bute's Case*:

' To hold that the marquis was guilty of neglect or omission in respect of this duty, in the absence of any knowledge or notice that it was not duly performed, would, in my opinion, be to fix him with liability for the neglect and omission of others rather than his own. It was much pressed on me that, if this be so, all the trustees and managers might abstain from acting, leaving the business to be transacted by the officers of the bank alone, and yet escape liability. I have difficulty in seeing how this could happen without the knowledge of some at least of the trustees and managers. However this may be, it is not the present case. The affairs of the bank were, in fact, managed by some of the trustees and managers; and I do not think it necessary to inquire how matters would have stood if no trustee or manager had taken part in the conduct of the business'.

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[19] [1892] 2 Ch. 101.

Two interesting conclusions can be drawn from these remarks:

(1) A manager and trustee who continuously absents himself from meetings is in a safer legal position than one who attends, either regularly or intermittently.

(2) So long as one manager and trustee supervised the bank officials, apparently none of the absentees could be made liable for what he did or failed to do. It should be added that the savings bank was not incorporated, although the marquis appears to have been considered as if he were director. Evidently lax company practice was influencing the law of trusts.

The soundness of Stirling, J.'s estimate of the director's degree of responsibility was shown by the opinions of members of the House of Lords in *Dovey* v. *Cory*.[20] This was an action by the liquidator against Mr. Cory for misfeasance as a company director, on the failure of the National Bank of Wales. The bank was alleged to have paid dividends out of capital,[21] and although the directors stated every year in their report that provision was made for bad debts, this was in fact not done. The true state of affairs was known only to the managing director. Cory was a director who could have discovered the true position by analysing the weekly and quarterly statements issued to directors. Moreover, he was present at two meetings of the board when minutes were read mentioning the receipt of letters from the company's auditors. He failed to ask what the letters were about, and, if he had done, he would have discovered that the auditors were stressing the necessity of forthwith making provision for bad debts. The House of Lords held that Cory had not been guilty of negligence in his duties as a director. It was certainly clear that Cory was not at any time privy to the fraudulent way in which the company's business was being transacted. The House of Lords unanimously held that he had not been negligent either. Lord Davey put the whole matter in a nutshell when he said:

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[20] [1901] A.C. 477.

[21] The Court of Appeal doubted whether they had done this, and the House of Lords did not overrule the Court of Appeal.

'I think the respondent was bound to give his attention to and exercise his judgment as a man of business on the matters which were brought before the board at the meetings which he attended, and it is not proved that he did not do so. But I think he was entitled to rely upon the judgment, information, and advice of the chairman and general manager, as to whose integrity, skill and competence he had no reason for suspicion. . . . It was the duty of the general manager and (possibly) the chairman to go carefully through the returns from the branches, and to bring before the board any matter requiring their consideration, but the respondent was not, in my opinion, guilty of negligence in not examining them for himself, notwithstanding that they were laid on the table of the board for reference'.

It is difficult to conceive of greater tenderness for the director than this. It evokes no responsive echo in the decisions of most jurisdictions in the United States. Unhappily, this well-known tenderness has coincided, in the past, with a succession of cases in which the incapacity or non-attendance of ornamental directors has enabled mismanagement or worse to remain undetected for long periods. How far this could go is well illustrated by *Re Brazilian Rubber Plantations and Estates, Limited.*[22] The firm of C. W. & E. Meiter secured an option on rubber estates in Brazil for a purchase price of £15,000. After the property had passed through several hands, each time at a large profit, it was resold to a company formed for the purpose for £150,000. The company was in reality formed by the persons through whose hands the property had already passed at a substantial profit to themselves. The company's directors, however, were men of different status, and are described in the report as follows:

[22] [1911] 1 Ch. 425.

'The directors of the company, Sir Arthur Aylmer, Bart., Henry William Tugwell, Edward Barber, and Edward Henry Hancock, were all induced to become directors by Harbord or persons acting with him in the promotion of the company. Sir Arthur Aylmer was absolutely ignorant of business. He only consented to act because he was told the office would give a little pleasant employment without his incurring any responsibility.[23] H. W. Tugwell was partner in a firm of bankers in a good position in Bath; he was seventy-five years of age and very deaf; he was induced to join the board by representations made to him in January, 1906. Barber was a rubber broker and was told that all he would have to do would be to give an opinion as to the value of rubber when it arrived in England. Hancock was a man of business, who said he was induced to join by seeing the names of Tugwell and Barber, whom he considered good men'.

So equipped, the new venture went forth, with grossly misleading statements in the prospectus, based on a report made by Meiter, who had first purchased the option, when the purchase price of the estates was £15,000. He had never been near the estates, and the report was written in London. The company duly purchased at £150,000, and it is scarcely surprising that it ran into heavy weather and swiftly sank. The liquidator sought to make the directors liable, but the Court held that the directors honestly believed the contract to be a beneficial one for the company, so that there was no misfeasance. In any event, even if the Court had held their omissions to be misfeasance, the indemnity clause would have fully protected them. Even so, it is valuable to consider the terms in which Neville, J., in this remarkable case, defined the director's obligations:

'It has been laid down that, so long as they act honestly, they cannot be made responsible in damages unless guilty of gross negligence. There is admittedly a want of precision in this statement of a director's liability. In truth, one cannot say whether a man has been guilty of negligence, gross or otherwise, unless one can determine what is the extent of the duty which he is alleged to have neglected. A director's duty has been laid down as requiring him to act with such care as is reasonably to be expected from him, having regard to his knowledge and experience. He is, I think, not bound to bring any special qualifications to his office. He may undertake the management of a rubber company in complete ignorance of everything connected with rubber, without incurring responsibility for the mistakes which may result from such ignorance; while if he is acquainted with the rubber business he must give the company the advantage of his knowledge when transacting the company's business. He is not, I think, bound to take any definite part in the conduct of the company's business; but, so far as he does undertake it, he must use reasonable care in its dispatch. Such reasonable care must, I think, be measured by the care an ordinary man might be expected to take in the same circumstances on his own behalf. He is clearly, I think, not responsible for damages occasioned by errors of judgment'.

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[23] The articles contained an indemnity clause in very wide terms.

Following which observations one may reasonably inquire what a director *is* liable for.

Fourteen years later, in *Re City Equitable Fire Insurance Co.,*[24] the Court of Appeal once again discussed the director's position, and their judgments form the last full exposition of the question, and the basis for the principles generally cited in textbooks. Once again, it should be noticed, the views of the Court did not affect the question of the directors' freedom from liability, for the usual indemnity clause again appeared in the articles, and the directors could shelter behind that. However, the case merits a fairly close analysis. Its essential facts are summarised in the opening paragraph of Romer, J.'s judgment:

'On June 27, 1916, Gerard Lee Bevan became a director of the City Equitable Fire Insurance Co., Ltd. The company at that time was carrying on successfully the business of reinsurance of fire and marine risks, and was in a sound financial condition. On February 14, 1922, an order was made for the winding-up of the company by the Court. A searching investigation of the affairs of the company was then made, and this investigation disclosed a shortage in the funds of which the company should have been possessed by over £1,200,000. This deplorable state of affairs was in no way due to the company's trading operations as a reinsurance company. From the year 1916 onwards to February 28, 1921, which was the date of the company's last published balance sheet, there was a steady and most remarkable increase in the premium income of the company, due principally to the fact that it had been able to secure a large part of the business of the Munich Reinsurance Co., who before the outbreak of war had done most of the reinsurance business in this country. For the year ending February, 1916, the company's premium income for all classes of insurance was £363,000. For the year ending February, 1919, the premium income on fire and general account was £613,483, and on marine account was £1,351,000. For the year ending February, 1920, the corresponding figures were £1,189,759 and £1,422,471, and for the year ending February, 1921, they were £2,071,515 and £1,469,197. In each of the years 1919, 1920, and 1921 there was a large and progressive trading profit. The collapse of the company was not, therefore, due to its reinsurance business. It was entirely due to the following causes. Various industrial investments of the company, of which the net cost of the company had been £701,739, have realised, or are estimated to realise, £202,373, representing a loss of close upon £500,000. Over £445,000 of the company's funds had been applied in acquiring an interest in certain lands in Brazil, and this interest is estimated at the present time to be worth about £100,000 only. No less a sum than £110,000 had found its way into the hands of the company's manager in circumstances to be detailed hereafter, and none of that money is recoverable. A sum of £385,000 odd was due from Ellis & Co., the company's brokers, of which Bevan was the senior partner; and against this indebtedness the company held collateral security that has realised under £31,000. In respect of the balance it is estimated that only about £14,000 will ultimately be received as dividend in the bankruptcy of that firm. Bevan himself had misappropriated other moneys of the company amounting to nearly £7,000, and some £9,000 had been lent by Bevan or Ellis & Co. to a company, known as the Saskatoon Grain Co., without any authority whatever. Little, if anything, will be recovered in respect of these two sums. Nearly the whole of these enormous losses were brought about through Bevan's instrumentality, and a large part of them by his deliberate fraud. For that fraud he has been tried and convicted, and is now suffering the just penalty. But the question not unnaturally arises as to whether, during the period covered by Bevan's nefarious activities, the other directors and the auditors of the company were properly discharging the duties that they owed to the company's shareholders. The official receiver, as the liquidator of the company, alleges that they were not. He has accordingly included them, or such of them as are still living, as respondents, to the summons which he issued against Bevan . . . and whilst admitting, and rightly admitting, that they have acted honestly throughout, he claims that they have been guilty of such negligence as to render themselves liable in damages'.

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[24] [1925] Ch. 407.

The judgment of Romer, J. (as he then was) in this case is a mine of information upon the duty owed by directors in discharging the affairs of the company. Whilst agreeing that a director stood in a fiduciary relationship to the company, he doubted whether the statement that the director was a trustee had much further significance. He further pointed out, what is indeed apparent, that his duty would also be affected by the size of the firm, the standing of its administrative officers, and the distribution of business between the board and the staff. This was, indeed, an elaboration of the remarks of Lord Macnaghten in *Dovey* v. *Cory,* in which he doubts whether precise rules for the conduct of company business can be formulated. The learned judge also agrees that in the discharge of his office, the director must exercise some degree of skill and diligence, although 'to the question of what is the particular degree of skill and diligence required of him, the authorities do not give any very clear answer'. The standard is certainly not very high. Indeed, the learned judge was in any event bound by the opinions of the House of Lords in *Overend, Gurney & Co.* v. *Gibb,*[25] which are as follows:

'Whether or not the directors exceeded the powers entrusted to them, or whether if they did not so exceed their powers they were cognisant of circumstances of such a character, so plain, so manifest, and so simple of appreciation, that no men with any ordinary degree of prudence, acting on their own behalf, would have entered into such a transaction as they entered into'.

Romer, J., adds these three other principles:

(1) A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience.

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[25] [1872] L.R. 5 H.L. 480.

(2) A director is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodical board meetings, and at meetings of any committee of the board upon which he happens to be placed. He is not, however, bound to attend all such meetings, though he ought to attend whenever, in the circumstances, he is reasonably able to do so.

(3) In respect of all duties that, having regard to the exigencies of business and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly.

Behind the careful enunciation of these principles there can be discerned the conception of the able and efficient man of business, interested perhaps in many companies, who can rapidly sum up the position of the company from reasonably regular attendance at board meetings. Nevertheless, these principles also permit boards of directors to include incompetents with high-sounding titles, who attend rarely if ever, and whose effective contribution to any directors' meeting may be difficult to detect. They may not even be aware of the manner in which the permanent officials of the company are conducting its business. It would seem not unreasonable to suggest, therefore, that the reported decisions show that the courts have been remarkably sympathetic to the not-so-competent director, and that the statement that the director has the responsibilities of a trustee is of very restricted significance when applied to the director's position. It is true that the Companies Act of 1948 took some steps towards making the responsibilities of directors in one or two matters more precise than they had been before,[26] but in this respect the Act of 1948 is in no sense revolutionary, and it is a matter for consideration whether, even today, it would not be advisable to define the duties of directors positively, especially in regard to the supervision of the general policy of the company whose affairs they direct. In one respect however, there has been an important improvement in the law since the *City Equitable Fire Insurance Case,* in that the Act of 1929, and now section 205 of the Act of 1948, makes void the indemnity clause which was common form in company articles before 1929, although, by section 448, a director may obtain relief in cases of default if he has acted reasonably and honestly and ought fairly to be excused.

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[26] For example, in general, loans by a public company to a director are now prohibited; s. 190.

One final point may perhaps be noticed. The courts have not yet been called upon to determine the liability of members of boards of nationalised industries, but it may be hazarded that the standards applicable would be those of the directors of public companies. Whether this is an entirely satisfactory solution to the problem is also a matter for consideration.

3

NATIONALISATION IN LEGAL PERSPECTIVE

E. H. Scammell

I AM fully conscious that a paper on nationalisation would invite far more interest and enthusiasm if prepared from some point of view other than the legal one. Furthermore, such a paper would have a far less difficult period of gestation. It would be easy, on the one hand, to expound a thesis which would hail nationalisation as a fairy godmother to the nation; and equally easy, on the other hand, to construct a case personifying nationalisation as a tyrant with bloody hands. The thesis, however, on which I have chosen to dwell is one considering some of the legal aspects and consequences of post-war nationalisation, not excluding, where occasion demands, the pointing out of certain legal shortcomings.

MEANING OF NATIONALISATION

The word 'nationalisation' is not a legal term of art. In its widest sense it implies a making national in character.[1] But as applied to property it is usually understood to connote a 'passing into national ownership'.[2] In this sense many public bodies, undertakings and services in this country which are not ordinarily regarded as being nationalised, would have to be considered as such. One of the more obvious examples of such undertakings is the Post Office. In order, therefore, to keep the subject within reasonable bounds, I propose to limit the present discussion to a consideration of a particular form of post-war nationalisation. Although the measures of nationalisation with which I shall be concerned are those for which Labour Governments have been exclusively responsible, it is well to emphasise that nationalisation is not a process bearing any special political colour. Professor Robson[3] has pointed out that all modern political parties have been responsible at one time or another for sponsoring measures of nationalisation[4] and, indeed, the British Overseas Airways Corporation which was formed in 1939, largely as a result of Conservative sponsorship, is the model upon which the working mechanism of post-war nationalisation has been based.

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[1] See *Re Bland-Sutton's Will Trusts* [1951] 1 All E.R. 494, at p. 499, *per* Evershed, M.R.

[2] *Ibid.*, at p. 508, *per* Jenkins, L.J.

[3] *Public Enterprise*, 1937.

The period from 1946 to 1951 was, however, without doubt of unprecedented importance in the history of nationalisation. Looking back on this period, nationalisation is found to embrace —or hold in its clutches if you prefer—assets which may broadly be divided into three different categories:—

(1) Commercial undertakings and services;
(2) Social service undertakings; and
(3) Land uses other than permitted land uses.

Among the social service undertakings which have been nationalised, hospitals occupy pride of place.[5] I do not, however, propose to include this aspect of nationalisation in this paper since it has received very careful treatment in another paper in this series.[6] Furthermore, the subject of nationalisation of land uses by the Town and Country Planning Act, 1947, is a special and technical subject standing far too aloof to admit of treatment in a general review of nationalisation.[7] In these circumstances, I propose to restrict the present discussion to the nationalisation of commercial undertakings in post-war Britain.

FORM OF COMMERCIAL NATIONALISATION

Up to the present time the domestic commercial undertakings which have been brought under national ownership since the Second World War are civil aviation, coal, electricity, raw cotton, inland transport, gas, telecommunications and iron and steel. But it must be pointed out at once that neither the pattern nor extent of nationalisation in these cases has been a constant. The object of every measure of nationalisation is, of course, to bring a particular undertaking under public control, but public control is by no means synonymous with State ownership and, surprising though it may seem, in no case is the actual ownership in the nationalised undertakings vested in the State.[8] In this respect, therefore, the pattern of modern nationalisation differs from the form adopted in the case of the General Post Office, though this was not occasioned by any *legal* impediment. Parliament is omnipotent and not restricted in its freedom of action by any written constitution of greater or less rigidity and it would therefore have been easy for the legislature to have brought the ownership in the assets of the nationalised industries within the extended arms of the State and to have created new government departments for their administration. This was not, however, the method adopted. Moreover, as I have indicated, the form which nationalisation has taken in the different cases has varied. Throughout the whole scheme of commercial nationalisation there are, however, certain common factors, and a review of these will provide a general picture of the scheme.

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[4] Thus, the Coal Act, 1938, nationalising coal royalties, was sponsored by a Conservative Government.

[5] See *Re Bland-Sutton's Will Trusts* [1951] 1 All E.R. 494, recently affirmed on the nationalisation issue by a unanimous House of Lords; *Re Frère* [1950] 1 All E.R. 513.

[6] 'Hospitals and the National Health Service Act', by O. R. Marshall, p. 81, below.

[7] See, especially, as to this aspect of nationalisation, (1948) 13 *The Conveyancer and Real Property Lawyer*, pp. 37–49.

(1) The first common factor is the type of body which is set up by the individual Acts (except the Cable and Wireless Act, 1946) to run the particular nationalised industry, namely a statutory corporation. These corporations are frequently referred to as ' public corporations ', and although this is undoubtedly an accurate description, I prefer to refer to them by a title which seems to be more apposite in the present context, namely ' national corporations '. This again is, however, only a descriptive term, the individual corporations having been given various names such as ' Board ' (*e.g.*, the National Coal Board), ' Council ' (*e.g.*, the Gas Council), ' Authority ' (*e.g.*, the British Electricity Authority), ' Commission ' (*e.g.*, the British Transport Commission) and ' Corporation ' (*e.g.*, the Iron and Steel Corporation). But these differences in name have no legal significance. Each corporation is a legal person separate from its members and from its parent Minister. Each of them is charged with the duty of running its undertaking in an efficient manner and (with the exception of the Airways Corporations) so as to balance its income with outgoings. In every case there is

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[8] See *Tamlin* v. *Hannaford* [1950] 1 K.B. 18; *Re Bland-Sutton's Will Trusts, supra.*

statutory provisions bringing each of them under the supervision of the Government through a responsible Minister who is empowered to give directions to the corporation of a 'general character' and to appoint and dismiss its members and whose sanction is always required for the floating of loans. In addition to setting up these national corporations in whom rests ultimate responsibility for the efficient running of the nationalised undertakings, many of the Acts also set up or made provision for the setting up of inferior public corporations to act as agents of the main national corporation. Thus, in the case of transport, many of the functions of the British Transport Commission are distributed amongst six inferior corporations known as Transport Executives which act as delegates of the Transport Commission.[9] A somewhat different form exists in the case of electricity, and yet another form in the case of gas. On the other hand, the coal industry is administered by the National Coal Board acting without the assistance of subordinate corporations. The modern tendency, as the course of nationalisation in the post-war years has shown, is towards decentralisation. Thus the Iron and Steel Act, 1949, provides that the Iron and Steel Corporation is to 'secure the largest degree of decentralisation consistent with the proper discharge by the Corporation of their duties . . .'[10]

The keynote, therefore, of all the modern measures of nationalisation has been indirect control through a national corporation rather than direct control through a government department. Two reasons have been put forward for the choice of the national corporation rather than the government department as the instrument for running the nationalised undertakings. In the first place it has been well said that the English prefer evolution to revolution. Professor Wade[11] has used history to show that in many cases direct public control through a government department has been preceded by indirect control through a public corporation. On the basis of such developments, he asks: 'Will the National Coal Board give way to a new Ministry of Coal on the lines of the G.P.O., or an enlarged Ministry of Fuel and Power?' The second reason is that it was felt that the government department with its 'civil service' outlook was an unsuitable soil in which to expect the plant of commercial success and enterprise to flourish. On the other hand, the legally autonomous national corporation seemed to present a much more fertile soil. From the experience of the past few years, however, it may be doubted whether the department of the Postmaster-General is any less efficient from the commercial point of view than the National Coal Board or the British Transport Commission.[12] What seems to have happened is that the national corporations have unconsciously fallen into traditionalism in which precedent and official morality hold more sway than business expedience.[13] To combat this and to cultivate a more commercial attitude with its attendant economic success, a measure of competition and enterprise within each of the nationalised undertakings would seem desirable, but unfortunately there would appear to be definite legal obstacles standing in the way of such competition. Thus, it is the duty of some of the national corporations to run their undertakings so as to further the public interest, and in these circumstances it is questionable to what extent a measure of private enterprise within the public enterprise would be regarded as a failure to carry out this duty. Furthermore, all the national corporations are under a duty to ensure that both they and their subordinate corporations (if any) 'avoid any undue or unreasonable preference or advantage'. Such language is admittedly vague, but one construction is that one block of consumers must not be offered different terms from another block in the absence of express statutory authorisation.[14] It may therefore be doubted whether the national corporations, as at present constituted, are any more suitably fitted to running a commercial undertaking than a government department.

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[9] Transport Act, 1947, s. 5 (4).

[10] Section 3 (1) (*c*).

[11] *The Constitutional Aspect of the Public Corporation,* (1949) 2 *Current Legal Problems,* p. 172 *et seq.*

(2) The second factor common to the whole scheme of nationalisation is that of the expropriation by which the ownership in the assets of or securities in all undertakings engaged in the commercial enterprise earmarked for nationalisation was divested from the existing owners and vested in the relevant

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[12] See Sir Arthur Street, *The Public Corporation in British Experience*, Institute of Public Administration, 1947, pp. 14–18.

[13] *The Economist*, November 4, 1950, pp. 680–681.

[14] See, for example, Electricity Act, 1947, s. 36 (7) proviso (*a*). Generally, A. M. de Neuman, 'Some Economic Aspects of Nationalisation', (1951) 16 *Law and Contemporary Problems*, p. 702 *et seq.*

national corporation.[15] This aspect of nationalisation represents a great extension in the field of compulsory acquisition of property. For the most part the commercial undertakings which have been nationalised were previously run by a large number of independent private companies. Accordingly, a choice between two forms of expropriation was open to the legislature:—

(a) Expropriation of the physical assets of the companies; or

(b) Expropriation of the shares and securities in those companies.

The factors determining which method of expropriation should be employed ranged from commercial expedience to labour relations in the particular industry or service. Thus, in the case of the coal industry, the agelong strained relations between employers and employees made it desirable that there should be a complete change of owner, so that the expropriation in this case was of the physical assets of the former colliery companies. For somewhat different reasons this method of expropriation was also adopted in the case of electricity, gas and inland transport. The other and indirect method of expropriation—that of divesting holders of securities of their securities in the companies concerned—was adopted in the case of iron and steel and telecommunications companies. In these cases the change effected was essentially one of shareholding. Thus, for example, the Iron and Steel Corporation became the exclusive shareholder in all the companies brought within the Iron and Steel Act, the ownership in the physical assets and undertaking remaining, as before, in the private companies. This method of nationalisation seems on the whole to be the more desirable because it ensures both commercial continuity and a decentralisation which is not artificial.

From the point of view of the legal position of the private companies directly affected by nationalisation, the position varies according to the form of expropriation applied. Where the change has merely meant the transfer of shares and securities from private hands into the hands of a national corporation, as in the case of iron and steel, the private companies engaged in the enterprise are legally unaffected. But as sole shareholder the national corporation can, of course, dictate to the private companies in accordance with general principles of company law.[16] Where, however, the expropriation has taken the form of divesting private companies of the whole or part of their physical assets and undertaking and vesting them in a newly-created national corporation, then the question arises as to what happens to the companies the whole or part of whose substratum has been thus removed. This question is of some importance since hundreds of companies are involved. The position varies according to whether the expropriation extends to all or only part of the assets of the company. Where expropriation extends to part only of the assets by reason of the company also carrying on business in a sphere which is not earmarked for nationalisation, then, assuming that the nationalisation does not prevent the company from accomplishing its primary objects, the company will be legally unaffected except in so far as its permitted sphere of business will have been restricted. Where, however, expropriation extends to the whole of the assets of a company, the position is more complicated. Express statutory provision has been made in the case of electricity[17] and gas[18] companies and railway and canal undertakings.[19] In the case of gas and electricity, all the companies the whole of whose undertakings were expropriated, other than local authorities, were dissolved by the relevant Act. In the case of railway and canal undertakings provision is made for their winding-up and eventual dissolution. With other companies, their destiny is entirely in the hands of the shareholders.[20] With their permission the company can commit suicide by going into voluntary liquidation, or one or more of the shareholders may deal a final death blow by petitioning for a winding-up order. Any shareholder who, *inter alia,* has been the registered holder of his shares for at least six months during the preceding eighteen months can petition the Court for a winding-up order on the ground that, by reason of the substratum of the company having gone, it is just and equitable that the company be wound up.[21] On such a petition the Court may make such order as it thinks fit,[22] but once the compensation has been assessed and paid to the company it is difficult to see on what grounds the petition could be resisted.

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[15] In this connection, the Airways Corporations were dealt with peculiarly. No expropriation of *property* of private owners was effected by the Civil Aviation Act, 1946, but provision for compulsory acquisition of such property was conferred by the Act. See now, Air Corporations Act, 1949, s. 2 (4). In the non-conforming case of telecommunications, all but three of the shares in the undertakings concerned were vested in the Solicitor for the Affairs of H.M. Treasury.

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[16] Thus, s. 12 of the Iron and Steel Act, 1949, expressly declares that all rights attaching to the shareholding shall be vested in the Iron and Steel Corporation.

[17] Electricity Act, 1947, s. 14 (11).

[18] Gas Act, 1948, s. 17 (9).

[19] Transport Act, 1947, s. 24.

[20] Cf. *Scottish Insurance Corporation* v. *Wilsons and Clyde Coal Co., Ltd.* [1949] A.C. 462; *Re Isle of Thanet Electric Supply Co.* [1950] Ch. 161.

Where the company is wound up then, the ultimate result will be that the stock received by the company[23] as compensation for the expropriation of its undertaking will be realised and, after all liabilities have been satisfied, a distribution made amongst the shareholders according to their holdings.

Provided, however, that the necessary support is forthcoming from the shareholders the company could be reconstructed under the provisions of the Companies Act, 1948,[24] and the newly-constructed company could either retain the compensation stock and carry on business as a finance or investment company as did Cable and Wireless (Holding) Ltd. or, alternatively, the new company could sell the compensation stock and engage in a business in a sphere which is still open to private enterprise. It is clear, however, that, short of reconstruction, the company could not alter its objects so as to carry on an entirely new business.[25]

(3) Throughout the whole scheme of nationalisation in Britain, compensation has been the constant concomitant of expropriation. This is one of the fundamental respects in which the process of nationalisation in this country has differed from that of certain continental countries.[26] The reasons prompting the inclusion in the nationalising statutes of provisions for compensation were social and economic rather than legal since, unlike the position in the United States,[27] there is no constitu-

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[21] Companies Act, 1948, s. 222 (*f*); *Re Bleriot Aircraft Co.* (1916) 32 T.L.R. 253.

[22] Companies Act, 1948, s. 225 (1); *Re Eastern Telegraph Co., Ltd.* [1947] 2 All E.R. 104.

[23] See, *e.g.,* Coal Industry Nationalisation Act, 1946, s. 20 (1) (*a*).

[24] Section 287.

[25] Companies Act, 1948, s. 5.

[26] See *Luther* v. *Sagor* [1921] 3 K.B. 532; *Government of the Republic of Spain* v. *Arantzazu Mendi* [1939] A.C. 256.

[27] The Constitution of the United States requires 'just' compensation for condemnations under eminent domain; cf. *Jacobs* v. *United States* (1933) 290 U.S. 13.

tional requirement that expropriation shall be attended by compensation. Nevertheless, expropriation without compensation, although legally unobjectionable from the purely national point of view, might be attended with certain sanctions in the sphere of international law which seems to require the payment to foreign nationals of 'fair compensation' in respect of expropriation suffered as the result of nationalisation.[28] In these circumstances the measure of compensation awarded by the different nationalising Acts may become of importance from the international law viewpoint.[29]

(4) The fourth feature which characterises all post-war nationalised undertakings is a surrounding cocoon in the form of the statutory exclusion of private competition. There are, however, two cases in which this exclusion is not complete, namely, in the iron and steel industry and in civil aviation. In the iron and steel industry nationalisation is not all-embracing. What the Iron and Steel Act, 1949, did was to place in the hands of the Iron and Steel Corporation the securities in ninety-six leading iron and steel companies whose principal business consisted of mining, smelting and certain other heavy activities.[30] The most important class of steel companies which were excepted from nationalisation but which may perform activities similar to those of many of the nationalised companies, comprises all companies whose main activity was the manufacture of motor vehicles.[31] The reasons for this exception were political rather than legal. Further, in the field of civil aviation private competition is not wholly excluded, though the effect of the Air Corporations Act, 1949, is to limit this competition to the provision of *charter* services. Private competition in the form of the provision of *regular* air services between two places of which at least one is in the United Kingdom is prohibited.[32] In respect of charter services section 16 (3) of the Civil Aviation Act, 1949, makes some attempt to secure that the Airways

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[28] See M. Whiteman, *Damages in International Law*, 1937, Vol. 2, pp. 915–929, and B. Cheng, *The Anglo-Iranian Dispute*, (1951) 5 *World Affairs* (New Series), at p. 392.

[29] As to what the measures are, see Dr. Mary Bell Cairns, 'Some Legal Aspects of Compensation for Nationalised Assets' (1951) 16 *Law and Contemporary Problems*, pp. 594–619.

[30] Iron and Steel Act, 1949, s. 11.

[31] Iron and Steel Act, 1949, s. 11 (3) proviso.

[32] Section 24, re-enacting s. 23 of the Civil Aviation Act, 1946.

Corporations shall be in no better position than private companies, yet by section 13 of the Air Corporations Act, 1949, express provision is made for subsidising the Airways Corporations until 1956, and although this was primarily intended to give an international boost to the prestige of this country's regular air services, there is no provision to exclude a subsidy being obtained in respect of the provision by the Airways Corporations of charter services.

GENERAL LEGAL PROBLEMS OF NATIONALISATION

With this general picture of the salient features of, and problems attaching to, the institution of nationalisation itself, I propose now to deal with some of the problems which nationalisation poses within the sphere of certain branches of law. New law created by the legislature rarely falls neatly into the existing compartments but has to find its way in by devious routes. This problem of how the new law is to dovetail into the old is a matter which unfortunately rarely provokes enthusiasm, much less action, on the part of the legislature and is therefore one which tends to be left to try the ingenuity of the courts. The statutory wings on which nationalisation became airborne provide no exception to this state of things. Up to the present time, a number of decisions have been given by the courts providing valuable assistance, but the whole subject still bristles with unsolved problems, to a few of which attention will now be turned.

Constitutional Law. The exact constitutional position of the national corporations in charge of the nationalised undertakings has not yet been fully settled. This question is likely to be of some practical importance in connection with the extent to which judicial control can be exercised. It has been suggested [33] that they fall somewhere between government departments and local authorities. On the one hand *Tamlin* v. *Hannaford* [34] decided that they do not rank as government departments; whilst, on the other hand, they are more closely linked with the Government through their parent Minister than are local authorities whose members are elected and who are not subject to receive general directions from a Minister. It is, at any rate, now clear that being neither servants nor agents of the Crown and their functions not being such as fall within the province of government, they do not share in the privileges and immunities of the Crown.[35] They are, however, public authorities[36] and, in addition, many of them are given special statutory privileges. Three such privileges are common to a number of the national corporations:—

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[33] By Charles Winter, 'Parliamentary, Ministerial and Judicial Control of Nationalised Industries in Great Britain', (1951) 16 *Law and Contemporary Problems,* at p. 692.

[34] [1950] 1 K.B. 18.

(1) In the case of the National Coal Board, the British Transport Commission, the Electricity Authority, the Area Gas Boards and the Iron and Steel Corporation, a three year period of limitation applies.[37] This represents a compromise between the one year period afforded to public authorities under the Public Authorities Protection Act, 1893, as amended, and the normal period of six years under the Limitation Act, 1939. In other cases where no special period is laid down, as in the case of the Airways Corporations, it is conceived that the relevant period of limitation is one year.

(2) Powers of compulsory acquisition of *land* are conferred upon the Transport Commission, the British Electricity Authority and the Area Gas Boards.[38] Further, the Transport Commission and the two Airways Corporations are invested with delegated powers of nationalisation. At the present time, and subject to certain exceptions, in particular the services provided by the London Transport Executive, passenger road transport continues to be provided by private enterprise. But the Transport Act, 1947,[39] authorises the Transport Commission to submit a scheme to the Minister of Transport for the nationalisation in any particular area of road passenger transport undertakings operating in that area and such a scheme

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[35] *Tamlin* v. *Hannaford, supra.*

[36] The Iron and Steel Corporation, the British Transport Commission and the Transport Executives are statutorily declared to be such—Transport Act, 1947, ss. 1 (1) and 5 (1); Iron and Steel Act, 1949, s. 1 (1).

[37] Coal Industry Nationalisation Act, 1946, s. 49; Transport Act, 1947, s. 11; Electricity Act, 1947, s. 12; Gas Act, 1948, s. 14; Iron and Steel Act, 1949, s. 10. A committee presided over by Tucker, L.J., recommended in 1949 the abolition of special periods of limitation enjoyed by public authorities and the national corporations, but no legislative action has yet been taken.

[38] Transport Act, 1947, s. 8; Electricity Act, 1947, s. 9 (1); Gas Act, 1948, s. 11.

[39] Section 64 (1) (*a*) and (*b*).

becomes operative on being embodied in a ministerial order.[40] A peculiarity about this power of the Transport Commission is, however, that if nationalisation is proposed, it can apparently only be effected by the *direct* method of expropriation of the physical assets of the private undertakings and not by the commercially more desirable method of expropriation of the securities in those undertakings.[39]

Again, in the field of civil aviation charter air services are still provided by private enterprise, but the Air Corporations Act, 1949,[41] authorises both the Airways Corporations themselves to take the initiative in nationalising, *inter alia*, any private undertaking providing charter services, and in this case the nationalisation may either take the direct form of expropriation of physical assets or the indirect form of expropriation of the shares or stock in the private undertaking. It is thought that these provisions for delegated nationalisation represent a unique extension in the field of compulsory acquisition, but that they must be regarded as the natural corollary of all measures of nationalisation which do not entirely oust private competition.

(3) Lastly, transitory power to disclaim certain contracts and leases is conferred upon the National Coal Board, the British Transport Commission, the British Electricity Authority, the Area Gas Boards and the Iron and Steel Corporation.[42]

Throughout the campaigning of the cause of nationalisation in this country much emphasis was placed upon the proprietary interest which the people would collectively enjoy as a result of nationalisation. Politicians spoke of the railways becoming 'your railways', and this attitude was persisted in for some time after certain measures of nationalisation had become an accomplished fact. The statutes which translated the theory of nationalisation into practice, however, were, by contrast, extremely reticent in conferring any positive rights. Most of the statutory duties imposed upon the national corporations are, indeed, expressed as legal obligations, but no mode of enforcing such obligations has been ordained by the Acts. Furthermore, no special remedial machinery is provided to cope with the situation of a national corporation acting outside or in abuse of its powers. Far from this, in one case, that of the Iron and Steel Corporation, it is expressly provided in the section of the Act which sets out the functions of the Corporation that 'nothing in this section shall be construed as imposing on the Corporation, either directly or indirectly any form of duty or liability enforceable by proceedings before any court'.[43] Although the Iron and Steel Corporation stands alone in this respect, it must be remembered that the Iron and Steel Act is the most mature of all the nationalising Acts and reflects a deliberate policy to impose a minimum of legal responsibility on the national corporations as a whole.

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[40] Transport Act, 1947, s. 63 (1).
[41] Section 3 (4) (*a*).
[42] Coal Industry Nationalisation Act, 1946, s. 7 (2); Electricity Act, 1947, s. 18 (1); Gas Act, 1948, s. 22; Transport Act, 1947, ss. 15 and 46; Iron and Steel Act, 1949, s. 13.

Apart from the Iron and Steel Corporation, however, limited legal responsibility is imposed on the national corporations by common law sanctions and incidents.[44] The common law position may be summarised as follows.[45] First, in the absence of specific provisions, breach of a statutory command is indictable at common law as a misdemeanour.[46] Secondly, the performance of a statutory duty may probably be enforced on indictment or information filed by the Attorney-General.[47] Moreover, to the extent to which, if at all, any of the national corporations constitute legal charities (as to which see below) they can be compelled to carry out their duties on an information filed by the Attorney-General. Thirdly, in respect of an abusive or excessive exercise of any of their statutory powers, the Attorney-General may apply for an injunction to restrain the breach,[48] but, unless special damage has been suffered, a private individual can only apply as a relator in the name of the Attorney-General. Where, however, an individual can show special damage, he may apply for a declaration that the act is *ultra vires* the corporation and obtain an injunction to restrain its continuance.[49] Lastly, in the case of those statutory duties of the national corporations (including the Iron and Steel Corporation) which confer clear rights on individuals, the prerogative order of mandamus is available to compel the national corporation to carry out those duties.[50]

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[43] Iron and Steel Act, 1949, s. 3 (2).

[44] *Booth* v. *Trail* (1883) 12 Q.B.D. 8; *Ross* v. *Rugge-Price* (1876) 1 Ex.D. 269. This assumes, as it seems reasonable to assume, that the provision of Consumer Councils is not intended to constitute the exclusive machinery for compelling the national corporations to carry out their obligations.

[45] See Maxwell, *Interpretation of Statutes,* 1946, pp. 393–403; Friedmann, *Law and Social Change in Contemporary Britain,* 1951, Chap. 10; Halsbury, *Laws of England* (Hailsham ed.), Vol. 31, pp. 550–555.

[46] *R.* v. *Buchanan* (1846) 8 Q.B. 883; *The Torni* [1932] P. 78, at p. 90.

[47] See Halsbury, *Laws of England* (Hailsham ed.), Vol. 31, p. 553.

[48] *Att.-Gen.* v. *Mersey Rly. Co.* [1907] A.C. 415 (railway company restrained from running omnibuses).

The net result is that the impressive declarations of duty in the nationalising statutes are by no means matched by corresponding legal machinery for enforcing the execution of such duties. In these circumstances, the ultimate sanctions conditioning the conduct of the national corporations in the performance of their functions must be political, in the form of ministerial and parliamentary censure.[51]

An extra-legal and indirect relationship between the public and the national corporations has, however, been established in the shape of Consumer Councils and Consultative Committees.[52] These Councils and Committees are bodies appointed by the appropriate Minister to receive complaints and suggestions from the consumers or users of the particular goods or services provided. They have been set up in all cases except where consumer opinion would serve no useful purpose as in the case of telecommunications. On the basis of consumers' expressions of opinion, the Consumer Councils must make representations to the corporation or to the parent Minister. There is, however, no guarantee that such representations will be acted upon, but in the last resort and under the pressure of public opinion, legal effect could be given to them by the Minister directing the corporation to take appropriate steps to implement the suggestions or remove the cause of complaint.

Law of Trusts. In the sphere of the law of trusts two distinct problems arise :—

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[49] See *Smith* v. *London Transport Executive* [1949] Ch. 685.

[50] See *The Queen* v. *Leicester Guardians* [1899] 2 Q.B. 632, where a mandamus was granted to compel the guardians to appoint a vaccination officer.

[51] See Charles Winter, 'Parliamentary, Ministerial and Judicial Control of Nationalised Industries in Great Britain', (1951) 16 *Law and Contemporary Problems*, pp. 670–701 ; Lord Nathan, 'English Law and Nationalised Industries', (1950) 5 *The Record of the Association of the Bar of the City of New York*, at p. 240 *et seq.*

[52] Coal Industry Nationalisation Act, 1946, s. 6 ; Transport Act, 1947, s. 6 ; Electricity Act, 1947, s. 7 ; Gas Act, 1948, s. 9 ; Civil Aviation Act, 1949, s. 37 ; Iron and Steel Act, 1949, s. 6.

(1) Are all or any of the new national corporations charities in the legal sense?

(2) Does the expropriation occasioned by nationalisation or any subsequent compulsory acquisition, effect a conversion of realty into personalty for all purposes?

(1) For the purposes of considering the first question I shall take the National Coal Board as representative of the majority of the commercial national corporations. The present question therefore is whether in law this corporation is a charity.

For an object to be charitable it must satisfy two conditions:—

(a) It must benefit the community or a section of it;

(b) It must come within the spirit and intendment of the preamble of the Statute of Elizabeth.[53]

For the purpose of considering these requirements the statutory duties of the National Coal Board may be divided into two classes. First their primary duties are to secure the efficient development of the coal mining industry and make supplies of coal available of such qualities and at such prices as seems best calculated to further the public interest in all respects.[54] Secondly, the Board are under obligations to promote research in the coal industry and provide training and education for their employees.[55] The Board's duties in connection with coal production and distribution and in relation to research clearly satisfy the requirement of benefiting the community or a section of it.[56] With regard, however, to the question of public element in the Board's duty to provide training and education for its employees, some difficulty arises. Two arguments can be put forward for the view that it does satisfy the requirement of benefit to the community. First, it would seem that since coal is a national monopoly the training and education of employees in the coal industry must directly or indirectly benefit the community as a whole. Secondly, it is submitted that the case of *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund,*[57] and the recent case of *Oppenheim* v. *Tobacco Securities Trust* [58] can be distinguished. In both cases it was held that a gift for the benefit of the employees of a particular company did not benefit the community or a section of the community so as to constitute a charitable gift. The conditions produced by the nationalisation of a particular industry would seem, however, to make a material difference to this question in relation to the employees of a national corporation. In this connection it is clear that a gift for the education of the members of a particular profession or calling, such as clergymen, lawyers, railwaymen or colliery workers, satisfies the requirement of public benefit.[59] Where, therefore, all the members of a particular calling are necessarily employed by one employer, a description of such members by reference to their employer may be the same thing as a description of them by reference to their calling.[60] Thus, a gift for the benefit of the employees of the National Coal Board necessarily involves benefit to all employees following the calling of coal mining. Accordingly, it is arguable that the employees of a national corporation such as the National Coal Board do constitute a section of the community for the purposes of the requirements of a charity.

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[53] *Williams Trustees* v. *Inland Revenue Commissioners* [1947] A.C. 447, *per* Lord Simonds.

[54] Coal Industry Nationalisation Act, 1946, s. 1 (1).

[55] *Ibid.*, s. 1 (2) (*b*).

[56] *Nightingale* v. *Goulbourn* (1848) 2 Ph. 594.

[57] [1946] Ch. 194.

[58] [1951] 1 All E.R. 31.

On these premises the second condition which must be satisfied is that the objects of the National Coal Board must be within the spirit and intendment of the Act of Elizabeth. With regard to the Board's duties to provide training and education and to promote practical research, there can be no doubt. Educational purposes of such a kind fall specifically within the classification of charitable objects given in *Income Tax Commissioners* v. *Pemsel*.[61] But with regard to their duty to prosecute the commercial working and distribution of coal, greater difficulty arises. The mere fact, however, that the object of the Board is to sell coal at economic prices does not affect the question. Provided an object is charitable, it does not matter that that object is pursued along commercial lines provided only that it is pursued on a non profit-distributing basis,[62] and the Coal Board, should it make a profit, is bound to plough it back into the industry.[63]

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[59] *Att.-Gen.* v. *Lonsdale* (1827) 1 Sim. 105.

[60] See *Oppenheim* v. *Tobacco Trust, Ltd.* [1951] 1 All E.R. 31, at p. 35, *per* Lord Simonds.

[61] [1891] A.C. 531.

[62] *The Abbey, Malvern Wells, Ltd.* v. *Minister of Town and Country Planning* [1951] 2 All E.R. 154.

[63] Coal Industry Nationalisation Act, 1946, s. 30 proviso (*a*).

Prima facie, however, there is some difficulty in bringing the promotion of commercial enterprise within the spirit and intendment of the Act of Elizabeth. This Act is not, however, altogether silent on the matter of commercial enterprise. Thus it specifically enumerates as a charitable object the supportation and help of young tradesmen, and of handicraftsmen whether young or old. It might be argued that the spirit of these provisions was a desire to make charitable such commercial activities as it is in the public benefit to serve, and on such a construction, the modern conception of commercial public benefit might be thought to lie in the direction of national commerce. Moreover, there is some authority for such a proposition in *Crystal Palace Trustees* v. *Minister of Town and Country Planning*.[64] In this case Danckwerts, J., decided that the grounds of the Crystal Palace, held by trustees under the Crystal Palace Act, 1914, for certain purposes including 'The promotion of industry, commerce and art', were held for charitable purposes. In this case it is clear that the promotion of industry, commerce and art was not the predominant purpose for which the trustees held the land, and it has been suggested that only where it is the subordinate purpose will an object, otherwise charitable, remain charitable. There seems, however, to be no actual decision precisely dealing with this point and the line must in any case be vague. As pointed out earlier, one of the functions of the National Coal Board is the training and education of its employees—an object which, provided it passes the test of benefiting a section of the community, is clearly charitable. In these circumstances it might seem a comparatively short step to extend the *Crystal Palace Case* to the functions of the National Coal Board and other national corporations. It is admitted that the consequences of the national corporations or any of them being held to be charities would be more inconvenient than convenient to them, particularly in relation to the jurisdiction of the Charity Commissioners and to administration generally, but in *Re Frère*[65] Wynn-Parry, J., held that the *fact* of nationalisation does not prevent a function otherwise charitable from remaining so, and accordingly, this inconvenience would seem to have no direct bearing on the issue. In connection with this question it

[64] [1950] 2 All E.R. 857.

[65] [1951] Ch. 27.

should be added that common to all the Acts is a provision to the effect that nothing in the Act shall be deemed to exempt the national corporation from liability for any tax, duty, rate levy or other charge whatsoever, whether general or local.[66] In view of this it may be, though the contrary is arguable, that the exemptions from such liabilities which normally attend charities could not be claimed by a national corporation even if it were held to be charitable. Such exemptions relate to such important liabilities as income tax and development charges under the Town and Country Planning Act, 1947. There is no reason to suppose, however, that the appearance of this common provision can in any way affect the substantive question.

(2) The second question which arises in the field of equity—whether expropriation effects a conversion for all purposes—is significant in relation to the effect on a testamentary disposition of land where the subject-matter is expropriated before the death of the testator either in the process of nationalisation itself, or as a result of an exercise of the powers of compulsory acquisition vested in many of the national corporations. In neither case is there any provision in the Acts dealing with the question as to whether the compensation money or stock with which the land is replaced is to be regarded for any purposes as realty. In these circumstances and on the authority of *Re Galway's W.T.*,[67] which dealt with an analogous problem arising as a result of the Coal Act, 1938, it would seem that conversion does in fact take place for all purposes, at any rate after the divesting of the legal estate in the land. If this is so, then it seems likely that a considerable number of testamentary gifts of land will be adeemed.

(3) A third point which used to affect trustees holding government stock issued as compensation under the Coal Industry Nationalisation Act, 1946, was that subject to certain exceptions, such stock was inalienable. This restriction has, however, now been abolished by the Coal Industry Act, 1949.

Company Law. The application of certain rules of company law to the national corporations would seem to give rise to some difficulty. Perhaps the most important problem which arises is in connection with the application of the principle in *Royal*

[66] *E.g.*, Electricity Act, 1947, s. 11 (1).
[67] [1950] Ch. 1.

British Bank v. *Turquand*.[68] This principle is that persons dealing with a corporation are not concerned to inquire whether all matters of internal management have been complied with in the absence of anything putting them on inquiry. That is to say, persons dealing with a corporation are entitled to assume that it is acting properly so far as internal requirements are concerned. The question of the application of this principle to persons dealing with a national corporation or its inferior bodies, may arise in three different sets of circumstances:—

(a) In connection with powers which a national corporation purports to exercise;

(b) In connection with powers which inferior public corporations acting as agents of a principal national corporation purport to exercise, *e.g.*, Transport Executives or Area Electricity Boards;

(c) In connection with powers purported to be exercised by subsidiary companies of a national (holding) corporation, *e.g.*, nationalised iron and steel companies.

(a) The problem of the application of the principle in *Royal British Bank* v. *Turquand* to the acts of a national corporation may arise in two principal ways. First, in connection with the effect of general directions given by the parent Minister to a corporation and, secondly, in connection with an exercise by the corporation of such of its powers as it can only exercise with the sanction of the Minister. As to the first case, a common form provision occurring in all the Acts nationalising commercial undertakings is that 'The Minister may, after consultation with the national corporation, give the corporation directions of a general character as to the exercise and performance by the corporation of their functions in relation to matters appearing to the Minister to affect the national interest, and the corporation shall give effect to any such directions'.[69] Now there is no provision for the publication of any directions given by a Minister in the exercise of such a power, although the corporation concerned is usually under a duty to include any such directions in its annual report, but even here the Minister may direct the corporation not to include any particular directions in the report where, in his opinion, it would be against the national interest to do so.[70] In such circumstances the question arises as to the position of an innocent third party if, for example, the National Coal Board purported to exercise a power which the Minister of Fuel and Power had directed it not to exercise or to exercise only in a particular way. It may well be that cases involving deliberate contravention of ministerial directions will be rare, but a contravention might result as the consequence of misconstruction. In such a case could the National Coal Board set up the ministerial directions as an answer to liability under the transaction entered into? It is submitted that the rule in *Royal British Bank* v. *Turquand* ought to be applied so as to protect the unsuspecting third party, though considerations of public policy might be marshalled against such a result. It is submitted, however, that such considerations could not be pressed too far in view of the legislature's attitude in connection with Development Corporations set up under the New Towns Act, 1946. This Act authorises the Minister to give directions restricting the exercise of any of the Corporations' powers or to give instructions as to the manner of their exercise, but it is further provided that 'any transaction between any person and any such corporation acting in purported exercise of their powers under this act shall not be void by reason only that it was carried out in contravention of such directions unless the person had actual notice of the directions'.[71] It was, perhaps, an oversight that a provision of a suitable kind was not similarly provided in the case of the commercial corporations.

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[68] (1855) 5 E. & B. 248; (1856) 6 E. & B. 327.

[69] See, *e.g.*, Coal Industry Nationalisation Act, 1946, s. 5 (1); Transport Act, 1947, s. 4 (1); Electricity Act, 1947, s. 5 (1); Gas Act, 1948, s. 7 (1); Air Corporations Act, 1949, s. 5 (1); Iron and Steel Act, 1949, s. 4 (1).

The second aspect of the problem in connection with national corporations arises out of the several statutory provisions which confer powers upon the national corporations but make the exercise of those powers subject to ministerial sanction. By way of illustration, a power which is common to all the commercial corporations, but which can only be exercised with ministerial sanction, is the power to borrow money temporarily by way of overdraft or otherwise.[72] In such a case the question which arises is whether on being approached for a temporary loan, the bank or other financier is entitled to assume that the requisite sanction has been obtained. It is submitted that here again the principle in *Royal British Bank* v. *Turquand* ought to apply.

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[70] See, *e.g.*, Coal Industry Nationalisation Act, 1946, s. 54.

[71] New Towns Act, 1946, s. 2 (3) (*b*).

[72] See, *e.g.*, Coal Industry Nationalisation Act, 1946, s. 27; Transport Act, 1947, s. 88 (1); Electricity Act, 1947, s. 39 (1); Gas Act, 1948, s. 42; Air Corporations Act, 1949, s. 8; Iron and Steel Act, 1949, s. 32 (1).

A provision peculiar to the Air Corporations Act, 1949, but which gives rise to the problem in acute form is that contained in section 3 (5) of the Act providing that 'The Minister may, by an order relating to either of the two corporations, limit the powers of the corporation, to such extent as he thinks desirable in the public interest, by providing that any power of the corporation specified in the order shall not be exercisable except in accordance with a general or special authority given by him'. It is further provided that any order so made must be laid before Parliament and that Parliament may annul it within forty days. There is, however, no provision for publication, the Rules Publication Act, 1893, being expressly excluded. This provision is therefore likely to give rise to a situation in which there are no practical means even of ascertaining whether any sanction is required.

(b) In connection with the application of the rule in *Royal British Bank* v. *Turquand* to the acts of inferior public corporations, the conditions for germinating the problem are essentially similar except that the role of the Minister is here played by the parent national corporation. In these cases, however, the legal position is likely to be different by reason of the fact that such inferior corporations are, except in the case of Area Gas Boards, the agents of their parent corporation.[73] Considerations of space forbid further consideration of this problem here.

(c) As between a national (holding) corporation and its subsidiaries proper, for example, the Iron and Steel Corporation and its subsidiaries, it seems reasonably clear that the existing rules and principles of private company law continue to apply.[74] Accordingly, the rule in *Royal British Bank* v. *Turquand* is directly applicable to the acts of the subsidiary companies.

The second problem in company law concerns the question whether the rules in *Foss* v. *Harbottle*[75] and *Burland* v. *Earle*[76] have any application in the nationalised undertakings. This

[73] See *Blackpool Corporation* v. *Locker* [1948] 1 K.B. 349.

[74] See, *e.g.*, Iron and Steel Act, 1949, s. 12.

[75] (1843) 2 Hare 461.

[76] [1902] A.C. 83.

question has a dual aspect. First, it seems reasonably clear that where nationalisation has taken the form of a change of ownership in the shares of companies engaged in an enterprise, as in the case of iron and steel, then these two rules continue to apply as between the national (holding) corporation and the private companies.[77] Secondly, it is very doubtful to what extent, if at all, these two rules can be applied by analogy as between the parent Minister and a national corporation. The rules in question provide that whilst a shareholder in private company law cannot bring an action in respect of the internal mismanagement of a company, he can bring an action to restrain the company from performing an illegal or *ultra vires* act. As applied to a national corporation, the question is whether the parent Minister can be regarded as standing in the shoes of a shareholder. If he can, then it means that he can bring an action in the courts to restrain the corporation from acting illegally or *ultra vires*. But if he cannot be so regarded he would appear to have no judicial remedy. Professor Friedmann[78] considers that neither of these rules is applicable to national corporations and that the remedies of the Minister must be political, administrative and disciplinary, and this view seems incontrovertible.

I would mention one final point in connection with company law. One vital difference between the national corporations and private companies is that in the case of the national corporations which owe their existence to specific statutes, their corporate veil is less of a fixture than in the case of private companies. If this were not so then there would truly be no difference in the position of the two types of corporation, but because of this difference, other important differences have appeared and more will no doubt be discovered with the passing of time.

Law of Contract. In the field of contract the general position is that the national corporations are fully liable. To consider the position in its true perspective, however, it is necessary to distinguish between contracts in which only one of the parties is a national corporation and contracts where both parties are national corporations. In the former case the liability of the national corporation is tempered only by the special privileges and immunities which it enjoys as a result of its constitutional position.[79] In the latter case, however, although one national corporation is legally distinct from any other,[80] special considerations arise. In this case a distinction must be drawn between contracts in which both corporations are under the general supervision of the same Minister, and those in which they are under the supervision of different Ministers. The National Coal Board, the British Electricity Authority and the Area Gas Boards are all under the supervision of the Minister of Fuel and Power. Accordingly, it is to be expected that disputes arising out of contracts between such corporations are more likely to be settled by consultation with the Minister of Fuel and Power than by resort to the courts, at any rate where important matters of principle are involved. Further, provided that the contract in question is one of a 'general character' the Minister could, in the exercise of his power to give general directions, order a variation or rescission of any such contract.[81] As a result of his statutory position it seems that the Minister is, in effect, arbitrator in such cases, to the virtual exclusion of the jurisdiction of the courts. Where, however, the two contracting corporations are supervised by different Ministers, then the problem of arbitration becomes more delicate and more frequent resort to the courts for the settlement of disputes is to be expected unless such disputes can be settled at Government level. In both sets of cases the common features are, first, that no question of private rights arises whilst, secondly, in the public interest, arbitration might be preferable to strictly legal determination. In these circumstances it is suggested that here is an honest place for an administrative tribunal to operate. In Soviet Russia where all industrial undertakings are State owned, civil law suits between different State undertakings are, with certain exceptions, removed from the competence of the ordinary courts to organs of State arbitration (*Gosudarstvenny Arbitrazh*, abbreviated *Gosarbitrazh*). Such bodies apply Soviet civil law to the determination of disputes but with due regard to the general interests of the State.[82] Even though in Britain less than 20 per cent of industry is nationalised, it is thought that an administrative tribunal for the determination of disputes between national corporations could serve a useful national purpose without at the same time encroaching on some interpretations of the 'Rule of Law.'

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[77] Cf. *R.* v. *South Wales Traffic Licensing Authority* [1951] 1 All E.R. 806.
[78] *Law and Social Change in Contemporary Britain* (1951), at p. 204.

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[79] See *Birkdale District Electricity Supply Co.* v. *Southport Corporation* [1949] 1 Ch. 180; Mitchell, *Contractual Liability of Public Authorities*, (1950) 13 *Modern Law Review*, pp. 318–340.

[80] Unlike the position in Soviet Russia; Ya. F. Mikolenko, 'When State Corporation Sues State Corporation', *Current Digest of the Soviet Press* (1951), Vol. 3, no. 45, p. 3 *et seq.*

[81] Consultation rather than direction seems to be in the ascendancy at the present time; see 21 *Political Quarterly* (1950), p. 150.

WIDER LEGAL ASPECTS OF NATIONALISATION

I now propose to say a final word about some of the wider legal aspects of nationalisation. As to the possibility of denationalisation, it has been said that any attempt at denationalisation would be comparable to an attempt to unscramble an egg. But from the purely legal point of view little difficulty is in fact presented. In those cases where nationalisation has taken the form of the transfer from private into public ownership of the shares in certain commercial companies, as in the case of iron and steel companies, it is purely a question of repealing the Act—the Iron and Steel Act, dissolving the Iron and Steel Corporation, and putting the shares at present vested in that corporation on the open market. From the economic point of view such a step may present difficulty,[83] but legally it would be a simple matter. On the other hand, in cases where nationalisation has taken the form of vesting the physical assets of privately owned commercial undertakings in specially constituted national corporations, more complicated legal machinery would be required. If, for example, it were proposed to denationalise inland transport, it would be necessary for the denationalising statute, not only to repeal the Transport Act and dissolve the six corporations created thereunder, but also to create new private companies of convenient units with share capital, whose shares could then be subscribed for by members of the public. To take such a step all at once would be virtually impossible for extra-legal reasons, but again, legally, little additional difficulty is presented.

As to the possibility from the legal point of view of a continued advance by nationalisation, it is little more than a matter of setting the duplicating machinery into motion. Moreover, it may be recalled that in present-day Russia nationalisation is all-embracing, whilst in medieval England it applied universally and not merely theoretically to land, in the form of feudalism. It may be that the history of feudalism in this country will to some extent be repeated in the history of nationalisation, and that in two or three hundred years from now, with the initiative perforce coming from Parliament rather than from Parliament and the courts combined, the law will be busy answering the call, not of the tillers for individual ownership, but of the traders for individual enterprise.

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[82] See 'Contract and Arbitration in Soviet Economy', (1950) 1 *Soviet Studies*, p. 383.

[83] See *The Times* newspaper, January 28, 1952, p. 5.

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THE LAW AND ETHICS OF THE COMPULSORY ACQUISITION OF LAND

RICHARD C. FITZGERALD

IN the course of his Address to the Association of London Property Owners on May 22, 1951, and entitled *Belgium's Answer to the Problems of Rent Restriction and Town Planning,* M. Victor Bure[1] said: 'It is a characteristic of our [Belgian] legislation which, I believe, constitutes a profound difference from English legislation, that alongside measures destined firmly to protect private property, Belgium has never hesitated, since the foundation of her independence, to promulgate laws permitting public authorities to expropriate private properties when the public interest so required. It is, I think, necessary to seek the origin of this in the famous "Declaration of the rights of man and citizen" of the period of the French Revolution, which affirmed that the individual could be dispossessed of his property if the public interest so required. This Declaration even speaks in precise terms of "the public need". The Belgian constitution took up this idea, while enlarging it. It stipulates that no person shall be deprived of his property unless it is for the public advantage, which is something more than the public need'.[2]

It seemed to me that far from there being a profound difference on this matter between Belgian and English legislation, there are, in fact, similarities, as I think this paper will show.

An Ordnance Minute dated September 1, 1681, records that it was ordered that a statement should be drawn up showing 'what measures were taken and what course was used aboute takeing in of the Lands for the new worke at Plymouth, and after what method the owners of those lands were sattisfied and paid for the same', and 'To see what Statutes there are concerneing takeing up of Peoples Lands for building of Fortificacons upon'.[3] A quarter of a century later—in 1708—a statute[4] was passed, the preamble to which reads as follows: 'Whereas for the better securing her Majesty's docks, ships of war and stores, 'tis highly necessary to enlarge or strengthen the fortifications at or near Portsmouth, Chatham, and Harwich, and in order thereto to purchase several lands, tenements and hereditaments, some of which are or may be the estates of infants, femes covert, ecclesiastical corporations, or other persons who by law are disabled to make any contracts or conveyances; in all which cases, as likewise where any proprietors designing to obstruct the public service or to make any unreasonable gain to themselves, insist on extravagant rates, 'twill be necessary to have recourse to the usual methods that have been taken in such like cases'.[5] Further statutes dealing with the purchase of private land for fortifications were passed in 1757 and 1758,[6] and again in 1782,[7] and there can be no doubt that by the end of the eighteenth century it was well recognised that, in the public interest, land should be capable of being compulsorily acquired for purposes of national defence, although Acts of Parliament of that period restricted the right to the taking of lands in particular areas.

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[1] Director-General of the Town Planning Directorate of the Belgian Ministry of Works, and President of the Housing Committee of UNESCO.

[2] Page 14 of the Address. What is said about Belgium in this paper is 'valid in principle for other continental countries, for example, France and Holland, where the nature of property rights and the administration powers towards these rights are very nearly the same as in Belgium'—M. Victor Bure, *op. cit.*, p. 12.

The passing of the first Reform Bill in 1832 resulted in considerable parliamentary activity, particularly as regards the amendment and consolidation of the law relating to railways and to the compulsory acquisition of land for public purposes. The Defence Act, 1842,[8] made it lawful for the principal officers of Her Majesty's Ordnance[9] to enter on, survey and mark out, or to cause to be surveyed and marked out, any lands wanted for the service of the Ordnance Department, or for the defence of the realm, and to treat and agree with the owners of such lands or with any persons interested therein for the absolute purchase of such lands.[10] This Act, as Lord Moulton stated in his judgment in *Att-Gen.* v. *De Keyser's Royal Hotel, Ltd.*,[11] '. . . gives to the Crown through its properly appointed officials the widest possible powers of taking land and buildings needed for the defence of the Realm under a minutely defined procedure set out in the Act'.

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[3] Ordnance Minutes (War Office Records), Appendix F to Scott and Hildesley, *The Case of Requisition,* 1920, p. 284.

[4] 7 Anne, c. 26.

[5] The statement 'the usual methods that have been taken in such like cases' seems to suggest that there was an estabished system for assessing compensation in default of agreement, the 'system' most probably being an inquisition and verdict by a jury as to the value of the property.

[6] 31 Geo. 2, c. 38; 32 Geo. 2, c. 26; and 32 Geo. 2, c. 30; dealing with fortifications at Milford; and 31 Geo. 2, c. 39; 32 Geo. 2, c. 30; dealing with fortifications at Portsmouth, Chatham and Plymouth.

[7] 22 Geo. 3, c. 80, relating to fortifications 'at or near Portsmouth and Chatham'.

[8] This Act covered the same ground as the Defence Act, 1804.

[9] The Ordnance Board Transfer Act, 1855, transferred the functions of the Principal Officers of the Ordnance to the Principal Secretary of State for War.

There had been a movement since the beginning of the nineteenth century for changing the form of Acts of Parliament from being local in operation, and relating to specific fortifications, to a more general and permanent form, and this movement culminated in the Defence Act, 1842, which Act was not limited either in time or place. During the latter part of the eighteenth century and the early part of the nineteenth century many Bills were before Parliament containing powers of compulsory acquisition for a variety of purposes, such as the provision of water supplies, the construction of canals, and the building of railways. Parliament had to be resorted to because, as Lord Parmoor pointed out in his judgment in *Att.-Gen.* v. *De Keyser's Royal Hotel, Ltd.*, 'Since Magna Carta the estate of a subject in lands or buildings has been protected against the Prerogative of the Crown'.[12] As with the Crown so, of course, with other bodies and persons, the landowner could not at common law be deprived compulsorily and unwillingly of his ownership. That being so, it is clear that the only source of power to acquire land compulsorily is Parliament. The perennial question is: Should Parliament grant powers to purchase land compulsorily and, if so, subject to what conditions?

SHOULD POWERS OF COMPULSORY PURCHASE BE GRANTED?

It will be readily appreciated that the grant of a power to purchase land compulsorily puts a stringent restriction on the rights, privileges and powers together constituting the ownership of the land affected by the power, and that a valid exercise of such a power deprives the owner of his estate and interest in the land. Is it ethical that an owner of land who does not wish to part with his ownership should be compelled to do so? The answer to this question cannot, in the middle of the twentieth century, be in any doubt. Who would contend that, as a general principle, a landowner should not be liable to be deprived compulsorily of his land, even though it would be to the public advantage that his land should be used for some public purpose? For example, railways are essential for the running of a highly industrialised society, and it would be folly to allow landowners to be in the position of being able to hold up the construction and development of railways by refusing to sell their land to railway undertakings. This was the view taken over a century ago. The first half of the nineteenth century was notable for the numerous Bills presented to Parliament for the construction of railways. In fact, they became so numerous that Parliament was virtually forced to pass the Lands Clauses Consolidation Act, 1845. It was practically certain that a Bill relating to a railway would include a power to acquire land compulsorily, and in order to save parliamentary time, the Lands Clauses Consolidation Act, 1845, was passed for the reasons stated in the preamble of the Act, *viz.*, the expediency of comprising in one general Act sundry powers usually introduced into Acts of Parliament relative to the acquisition of lands required for undertakings or works of a public nature; and the compensation to be made for the same, and to avoid the necessity of repeating such provisions in each of the several Acts relating to such undertakings, and to ensure greater uniformity in the provisions themselves.

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[10] Defence Act, 1842, s. 16.

[11] [1920] A.C. 508, at p. 553.

[12] *Ibid.*, at p. 569.

The range of public services has assumed immense proportions, and it is not surprising that powers of compulsory acquisition of land now exist in respect of, *e.g.*, clearance and redevelopment of slum areas[13]; education purposes[14]; highway development and improvement[15]; national health services[16]; police purposes[17]; proper planning of any area[18]; and water supply[19]; to mention a few examples in addition to that of national defence. The more highly civilised the community is, the greater the need of the community for public services of this kind, and the more reasonable it is to confer powers of compulsory acquisition of land.

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[13] Housing Act, 1936, Part 3.
[14] Education Act, 1944, s. 90.
[15] Development and Road Improvement Funds Act, 1909, ss. 5 and 11.
[16] National Health Service Act, 1946, s. 58 (2).
[17] Police Act, 1946, s. 5.
[18] Town and Country Planning Act, 1947, s. 38.
[19] Water Act, 1945, s. 24.

As Professor Keeton points out, it is preferable to speak of ownership, 'following Hohfeld's analysis, as a collection of rights, privileges and powers . . .',[20] and if one does that, then I think it at once becomes clear that Parliament has acted in the public interest in saying, in effect, that ownership shall not include the right, privilege or power to stop a more appropriate body from becoming the owner of the land for the public benefit.

Surely it is to the public benefit that powers of compulsory acquisition should exist, as they do, for enabling land to be compulsorily purchased for use for burial of carcases[21]; for public libraries[22]; for civic restaurants[23]; for enabling local authorities to provide aerodromes[24]; for camp sites[25]; and for enabling any Electricity Board[26] and any Gas Board[27] to discharge its duty of developing and maintaining an efficient co-ordinated and economical system of electricity or gas supply; and for the purpose of securing that land which is in a development area and which is derelict and likely to remain so for a considerable period is brought into use or of improving the amenities of the neighbourhood.[28]

For centuries the United Kingdom has shown no more hesitation than Belgium (whose constitution dates from 1830) to pass laws permitting the expropriation of private property. A big difference between the two countries, however, is that public interest suffices for the United Kingdom legislator, whereas in Belgium public advantage is an essential condition for a valid exercise of powers of compulsory acquisition. It is interesting to note, in passing, that 'the legal institution of expropriation, in the sense of a compulsory alienation of private rights by the State in the public interest, is almost unkown to Roman law'.[29]

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[20] Keeton, *The Elementary Principles of Jurisprudence*, 1949, pp. 172–173.

[21] Diseases of Animals Act, 1894, s. 33.

[22] Public Libraries Act, 1919, s. 6, as amended by the Education Act, 1944.

[23] Civic Restaurants Act, 1947, s. 2.

[24] Civil Aviation Act, 1949, ss. 19–21.

[25] National Parks and Access to the Countryside Act, 1949, s. 12.

[26] Electricity Act, 1947, s. 9.

[27] Gas Act, 1948, s. 11.

[28] Distribution of Industries Act, 1945, s. 5.

[29] Schulz, *Principles of Roman Law*, 1936, p. 161. I am indebted to my colleague, Mr. Raphael Powell, for this reference.

However, it is not the grant of compulsory powers which causes difficulty, but the exercise of such powers. The problem is how to confer power to act to the public advantage without, at the same time, unreasonably violating private rights. This difficulty can be avoided to a considerable extent by framing the power in such a way that there is no room for doubt as to the precise purposes for which land can be compulsorily acquired; by giving the dispossessed owner a legal right to proper compensation; and by devising reasonable safeguards for the exercise of such power.

MEANING OF 'LAND'

'Land', so far as compulsory acquisition is concerned, is not limited to the dry and solid portion of the earth's surface. The legal meaning of 'land' is much wider than the popular meaning. It has been mentioned above that powers of compulsory purchase can only be conferred by Act of Parliament,[30] and that the Lands Clauses Consolidation Act, 1845, provided a uniform code of provisions for the exercise of powers of compulsory purchase. So far as local authorities are concerned, the Acquisition of Land (Authorisation Procedure) Act, 1946,[31] has codified the procedure for obtaining the right to compulsory purchase of specific land,

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[30] See also *Dunball* v. *Walters* (1865) 35 Beav. 565, where at p. 567 Romilly, M.R., said '. . . an Act of Parliament alone can give any person the right of taking the property of another without his consent, although it be intended to be taken only on payment to him of an adequate pecuniary compensation'.

[31] The exceptions to the procedure laid down by this Act are compulsory purchase orders made under (a) the Light Railways Acts, 1886 and 1912, and (b) Part 3 of the Housing Act, 1936, which Part deals with clearance and redevelopment of insanitary areas. Section 1 (1) of the 1946 Act provides that where a local authority is authorised by a public general Act of Parliament in force immediately before April 18, 1946, to purchase land compulsorily, then the uniform code of procedure prescribed by that Act shall apply instead of the several procedures for compulsory purchase which were formerly applicable. As regards Acts passed subsequently to April 18, 1946, it is presumed that they will provide for the 1946 code of procedure to be applicable to all cases of compulsory purchase. Section 1 (3) of the 1946 Act provides for the incorporation of the Lands Clauses Acts and the other enactments mentioned in Parts 1 and 2 of the Second Schedule to the Act, and that the Acquisition of Land (Assessment of Compensation) Act, 1919, shall have effect in relation to any compulsory purchase to which the Act applies, subject to the provisions of Part 3 of the Second Schedule. The Lands Clauses Acts consist of the Lands Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Act Amendment Act, 1860, the Lands Clauses Consolidation, 1869, the Lands Clauses (Umpire) Act, 1883, and the Lands Clauses (Taxation of Costs) Acts, 1895.

and 'land' is defined for the purposes of that Act in relation to compulsory purchase under any enactment as including anything falling within any definition of land in that enactment. When considering, therefore, what land can be compulsorily purchased by a local authority it is essential to refer to the definition of land in the enabling Act of Parliament. For example, the Public Health Act, 1936,[32] enacts that land includes any interest in land and any easement or right in, to or over land. If, however, the enabling Act contains no definition of land, then the definition under the Lands Clauses Acts applies, and 'messuages, lands, tenements and hereditaments of any tenure'[33] can be compulsorily acquired. The Lands Clauses Acts confer no power to compel a landowner to grant an easement over his land,[34] but many public general Acts and special Acts include easements in the definitions of land contained in such Acts. For example, the definition of 'land' in the Acquisition of Land (Assessment of Compensation) Act, 1919,[35] includes water and any interests in land or water and any easement or right in, to or over land or water.

Clearly, what can be compulsorily acquired under the statutory power depends on the proper construction of the definition of 'land' contained in the enabling Act.

EXAMPLES OF POSSIBLE UNFAIR EXPROPRIATION

A local authority, having declared an area in its district as a clearance area on the grounds that the houses in that area are by reason of disrepair or insanitary defects unfit for human habitation, or are by reason of their bad arrangement or the narrowness or bad arrangement of the streets, dangerous or injurious to the health of the inhabitants of the area, and that any other buildings in the area are for a like reason dangerous or injurious to the health of the inhabitants, and that the most satisfactory method of dealing with the conditions in the area is the demolition of all the buildings in the area, then decides to purchase any land in the clearance area.[36] Is it necessarily fair and just that the local authority should have the right, as it has,[37] compulsorily to purchase also any land which is surrounded by the clearance area and the acquisition of which is reasonably necessary for the purpose of securing a cleared area of convenient shape and dimensions, and any adjoining land the acquisition of which is reasonably necessary for the satisfactory development or user of the cleared area? It is true that the Minister has to confirm the compulsory purchase order, and that even if the Minister does do so 'the Court, if the matter came before it, would quash the order if satisfied that there was no material evidence on which it could be said that the land was reasonably necessary for the satisfactory development of the cleared site'.[38] My point is that a private owner of land surrounded by, or adjoining, a clearance area can be compulsorily deprived of the ownership of his land merely because of its geographical situation and of the desire of the local authority to secure a clearance area of convenient shape and dimensions. Is it necessarily fair and just to put such an owner in this position? If the answer to this question is that it is to the public advantage that a local authority should have such a power, then why are certain classes of owners excluded? If the land which is surrounded by, or adjoins, the clearance area is the property of a local authority (*i.e.*, *any* local authority) then such land cannot be compulsorily acquired,[39] even though it is reasonably necessary for the purpose of securing a clearance area of convenient shape and dimensions, or its acquisition is reasonably necessary for the satisfactory development or user of the clearance area. Does the fact that a local authority, and not a private person, is the owner *ipso facto* mean that the land can no longer be reasonably necessary for the satisfactory development and user of the clearance area?

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[32] Section 343.

[33] This is the definition of 'land' in the Lands Clauses Act, 1845, s. 3.

[34] *Hill* v. *Midland Railway* (1882) 21 Ch.D. 143; explained in *Great Western Railway* v. *Swindon etc. Railway* (1884) 9 App.Cas. 787, at p. 802; *Re London School Board and Foster* (1903) 87 L.T. 700.

[35] Section 12 (2).

[36] Pursuant to its powers under Housing Act, 1936, Part 3, s. 25.

Again, the Town and Country Planning Act, 1947, has enormously increased the number of authorities entitled to exercise compulsory powers of purchase, and the purposes of such powers. A development plan prepared pursuant to the provisions of that Act may designate as subject to compulsory acquisition by (a) any Minister, local authority and statutory undertakers, any land[40] allocated by the plan for the purposes of any of their functions[41]; and (b) the appropriate local authority, any land which, in the opinion of the local planning authority, ought to be subject to compulsory acquisition for the purpose of securing its use in the manner proposed by the development plan.[42] This power, so far as local authorities are concerned, is not limited as to purposes. Where any land is so designated, the Minister, local authority or statutory undertaker, as the case may be, may acquire such land compulsorily.[43] Is it necessarily fair and just that, upon the completion by the acquiring authority of its compulsory purchase, all private rights of way and rights of laying down, erecting, continuing or maintaining any apparatus on, under or over the land should automatically be extinguished?[44] Why should not the acquiring authority, on the completion of its purchase, be subject to the same liabilities and burdens as the dispossessed owner was? Any person who suffers loss by the extinguishment of these private rights is entitled, it is true, to be paid by the acquiring authority compensation, to be determined in accordance with the Acquisition of Land (Assessment of Compensation) Act, 1919.[45] But monetary compensation may not from the point of view of the person who has lost the benefit of, *e.g.*, a right of way, be real compensation. It may be that, in the public interest, private rights of the character described should be extinguished in a particular case, but that fact, if it is disputed by the person entitled to the benefit of the rights, ought to be proved to the satisfaction of an independent tribunal. This raises the question of safeguards in the exercise of compulsory powers, to which we will return later.

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[37] Under Housing Act, 1936, Part 3, ss. 27 and 29.

[38] *Per* Swift, J., in *Burgesses of Sheffield* v. *Minister of Health* (1935) 100 J.P. 99.

[39] Housing Act, 1936, s. 36 (5).

RIGHT TO COMPENSATION

In *Att-Gen.* v. *De Keyser's Royal Hotel, Ltd.*[46] the real question was whether the subject is entitled to compensation for interference with his proprietary rights. The Crown contended that the right to requisition private property is a right to take without a corresponding obligation to pay, and it based its contentions on the royal prerogative, *i.e.,* the arbitrary and discretionary powers vested in the Crown at common law. When the case was before the Court of Appeal the Master of the Rolls suggested that a search should be made into the Public Records to ascertain whether there was any substance in these contentions, and as Lord Sumner stated in his judgment 'That the search for documents relating to the taking of land for fortifications and similar purposes in times past was left incomplete and indeed was not much more than begun, is matter of considerable regret. So far as it went, it is said to have been inconclusive. Probably it will never go any further, for the result has scarcely been such as would encourage the Executive to proceed with it, and the subject does not greatly attract the student of history. The records cover both peace and war. The result, as it stands at present, seems to be this. Many documents are forthcoming which relate to the taking of land for such purposes by agreement and on payment of compensation. None can be found relating to taking land as of right and without any compensation at all, even in time of war'.[47]

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[40] Defined by section 119 (1) of the Act as meaning any corporeal hereditament, including buildings and, in relation to the acquisition of land for planning purposes, any interest or right in or over land.

[41] Section 5 (2) (b).

[42] Section 5 (2) (c).

[43] Section 37.

[44] Schedule 11, s. 24.

[45] *Ibid.*

[46] Above. This case concerned a requisitioning of private property, but the judicial views as to compensation are equally applicable to a compulsory purchase.

The suppliants in the *De Keyser's Hotel Case* successfully contended that the taking of land is exhaustively covered by statute law which secures compensation to the private owner, and the case decided that the right to compensation now rests upon statute, and that the Crown cannot, by invoking the royal prerogative, take land for national defence and repudiate the statutory obligation to make payment. As Lord Parmoor said, 'Statutes which provide . . . compensation as a condition to the right of the Executive to take over . . . lands . . . come, in my opinion, within the category of statutes made for the advancement of justice and to prevent injury and wrong. This is in accord with the well-established principle that, unless no other interpretation is possible, justice requires that statutes should not be construed to enable the land of a particular individual to be confiscated without payment'.[48]

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[47] Above, at p. 563.

[48] *Ibid.,* at p. 576.

If a statute affects existing rights, but makes no express provision for compensation for the loss of those rights, then, as Brett, M.R., said in *Att.-Gen.* v. *Horner,*[49] 'It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged so to construe it. If it is clear and obvious that Parliament has so ordered, and there is no other way of construing the words of the Act, then one is bound to so construe them, but if one can give a reasonable construction to the words without producing such an effect, to my mind one ought to do so'. Nine years later, Bowen, L.J., in *London and North Western Railway Co.* v. *Evans,*[50] said 'The legislature cannot fairly be supposed to intend, in the absence of clear words showing such intention, that one man's property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him. Parliament in its omnipotence can, of course, override or disregard this ordinary principle as it can override the former, if it sees fit to do so, but it is not likely that it will be found disregarding it without plain expressions of such a purpose'. There is a close similarity in this respect between English and Belgian law, as the Belgian Civil Code, *i.e.,* the *Code Napoleon,* gives 'the widest possible definition to the rights of property. The legal text says that it is the right of enjoying and using things in the most absolute manner, provided that nothing is done in contravention of the law or regulations. In other words, the owner does as he pleases, and he can only be prevented where precise legal wording exists. Such precise wording, being an exception to principle, must be interpreted restrictively, that is to say, in the owner's favour. In the same way, if the wording is ambiguous, the ambiguity shall favour the owner'.[51] This appears to accord with English law, as in cases of ambiguity the rule of construction is that a person or body who claims special privileges under statutory powers is bound to satisfy the court that the legislation on which he or it relies confers those privileges with sufficient clearness.[52]

It is clear that in English law a landowner is always entitled to compensation for any land the ownership of which he has been forced to give up unless there is clear statutory direction to the contrary.

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[49] (1884) 14 Q.B.D. 245, at p. 257.
[50] [1893] 1 Ch. 16, at p. 28.
[51] M. Victor Bure, *op. cit.,* pp. 12–13.
[52] *Clowes* v. *Staffordshire Potteries Waterworks Co.* (1872) L.R. 8 Ch. 125.

The landowner has, so has the acquiring authority, the right after the expiration of fourteen days from the date of service of the notice to treat to apply to the Lands Tribunal[53] for the assessment of the compensation. As from July 1, 1948, there is only one set of rules[54] (consisting of six rules)[55] for assessing compensation for compulsory acquisition (unless the enabling Act expressly provides to the contrary). These rules, which are laid down by the Acquisition of Land (Assessment of Compensation) Act, 1919, as modified by the Town and Country Planning Acts, 1944 and 1947, are, generally speaking, reasonable, but such a matter as the amount of compensation which should be payable is obviously affected by changes in social and economic conditions, and it does appear that the rules, as they are now to be applied, operate in some respects to the unreasonable advantage of the public.

SOME CRITICISMS OF THE BASIS OF COMPENSATION

Thus the first rule states quite bluntly that no allowance shall be made on account of the acquisition being compulsory. Is this fair? Take the case of the owner of a private house which he has occupied for, say, twenty years, and which is now being compulsorily taken from him by a local authority in connection with the latter's housing scheme. He and his family are being deprived of their home: they are being torn up by the roots. The local authority, as they are proceeding under the Housing Act, 1936, have provided him with a flat owned by them because, the dispossessed owner being a member of the working class, the local authority is under a statutory duty to provide suitable alternative accommodation.[56] Would it not be just, however, to pay him compensation for the 'pain and suffering' which his forced eviction from his house and home will cause him, and for the loss of personal freedom he will suffer when he occupies the Council flat? Throughout the whole period of his owner-occupation of his house he was at liberty to choose his own wall-paper; to have a rockery in his garden; to paint his doorstep red; to keep domestic pets; and to lay linoleum.[57] He was also at liberty to have relatives to stay with him for a holiday without incurring any expense beyond, perhaps, their keep. But the local authority which is to be his landlord may hold the same views as certain other local authorities do about relatives coming to stay for a holiday, in which case he may be called upon to pay an additional weekly rent of three shillings if it is Uncle Bob, but only two shillings if it is his mother-in-law.

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[53] One of the functions of the Lands Tribunal is to determine in place of official arbitrators questions relating to compensation for the compulsory acquisition of land: Lands Tribunal Act, 1949, s. 1 (3).

[54] Before July 1, 1948, there were two sets of rules according to whether the acquiring authority was or was not a Government Department or public or local authority. By the Town and Country Planning Act, 1947, s. 57 (1), the Acquisition of Land (Assessment of Compensation) Act, 1919, applies to statutory undertakers (and the Central Land Board) as it already applied to Government Departments and local and public authorities, and thus the same rules apply to all acquiring authorities. The procedure for assessing compensation for injurious affection has always been governed by the Lands Clauses Acts, and always has applied to all acquiring authorities.

[55] See Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2.

Social and economic conditions were entirely different in 1919, when the rule was made, from what they now are, and the rule is no longer an ethical one, if it ever was. When statutory undertakers compulsorily acquired land a sum of 10 per cent was always added—under the Lands Clauses Acts—to the value of the land taken compulsorily, but no such additional sum could be given in respect of land compulsorily acquired by Government Departments and public and local authorities. As statutory undertakers are, as mentioned above, now in the same position as Government Departments and public and local authorities, this 10 per cent can no longer be awarded.

The second rule is to the effect that the value of the land shall be taken to be the amount which the land, if sold in the open market by a willing seller, might be expected to realise, but the proviso to the rule expressly stipulates that the Lands Tribunal is entitled to consider all returns and assessments of capital value for taxation made or acquiesced in by the claimant. This is an important proviso from the point of view of personal representatives, trustees and beneficiaries. For instance, it is common probate practice to put as low a value as possible on property, and the figure accepted by the Commissioners of Inland Revenue may be lower than the amount which a willing buyer would be prepared to pay for the land in the open market. Suppose that after the land has been vested by the personal representatives in the beneficiary absolutely entitled to it the land is acquired compulsorily. Would the Lands Tribunal be entitled to consider the probate value, on the ground that such value had been acquiesced in by the claimant, *i.e.,* the beneficiary who is now the owner? It is, of course, a question of fact whether the claimant did or did not acquiesce in the assessment of capital value, and no doubt each case will be judged on its own merits. But as the risk of land being compulsorily acquired has now become much greater, personal representatives, trustees and beneficiaries, in fact everybody, should hesitate before putting a value on land which is less than that which a willing buyer would be prepared to pay for the land in the open market. What is gained on the swings may easily be lost on the roundabouts. The proviso to rule 2 should be repealed, as the compensation payable in respect of land being compulsorily acquired should never be less than the amount which a willing buyer would pay for the land in the open market.[58]

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[56] Housing Act, 1936, s. 137.

[57] Bans on all these things and matters have been, and still are being, made by different local authorities.

Again, suppose X owns, say, a convalescent home, and land adjoining the convalescent home was purchased by X at a value higher than the market value because it was specially suitable for the purpose of extending the convalescent home. If X's property is compulsorily acquired then, under rule 3, the special suitability or adaptability of the adjoining land for that purpose cannot be taken into account. The Lands Tribunal will only be able to award compensation equal to the figure the land would fetch in the open market, assuming there was no bidder present requiring the land for a special purpose.[59] Is not rule 3 unfair in this respect? Surely, morally, every assumption should be made in favour of an owner who is being compulsorily deprived of his property, in which case it should be assumed that a bidder will be present who requires X's property for the special purpose and is willing to pay the special value of the property, the compensation being assessed accordingly on that footing. The legal importance of rule 3 has been considerably lessened by the provisions of section 51 of the Town and Country Planning Act, 1947, but from an owner's point of view that Act has made the question more important.

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[58] It is thought by some that the proviso to rule 2 was inserted so that evidence could be given of valuations of land made under the Finance (1909–1910) Act, 1910, and as these were repealed by the Finance Act, 1921, there may be this further reason for repealing the proviso.

[59] Rule 3 nullifies the effect of *Inland Revenue Commissioners* v. *Clay and Inland Revenue Commissioners* v. *Buchanan* [1914] 3 K.B. 466.

The sixth rule has given rise to conflicting judicial views, an instructive case on the effect of the rule being *Horn* v. *Sunderland Corporation*.[60] The rule itself provides that the provisions of rule 2 are not to affect the assessment of compensation for disturbance or any other matter not directly based on the value of land. The facts of the *Horn Case* were shortly these. Mr. Horn was the owner of a farm which he used in connection with his business of horse-breeding. The Sunderland Corporation compulsorily purchased the farm as a building site pursuant to their powers under the Housing Act, 1936. The question of compensation was referred to arbitration, and the arbitrator assessed the compensation at £22,700, and he stated that he had not included any sum for the disturbance of Mr. Horn's business, because the sum of £22,700 could be realised only by selling in the open market with vacant possession. Now, as Lord Justice Scott pointed out in his judgment,[61] on a compulsory sale 'the principle of compensation will include in the price of the land, not only its market value, but also personal loss imposed on the owner by the forced sale, whether it be the cost of preparing the land for the best market then available or incidental loss in connection with the business he has been carrying on, or the cost of reinstatement. Otherwise, he will not be fully compensated'. But 'The statutory compensation cannot and must not exceed the owner's total loss, for, if it does, it will put an unfair burden upon the public authority or other promoters, who on public grounds have been given the power of compulsory acquisition, and it will transgress the principle of equivalence which is at the root of statutory compensation, which lays it down that the owner shall be paid neither less nor more than his loss. The enunciation of this principle—the most fundamental of all—is easy enough. Its justice is self-evident, but its application to varying facts is apt to be difficult. It is not easy to spell out of it a general criterion which will afford a practical test in all cases'. The majority of

[60] [1941] 1 All E.R. 480 (C.A.).

[61] *Ibid.*, at p. 496.

the Court of Appeal (Sir Wilfrid Greene, M.R., and Scott, L.J.) held that since the value of Mr. Horn's land as building land could only be realised by the removal of the business, compensation for disturbance could not be awarded because the value as building land exceeded the sum of the value of the land as agricultural land plus the value of the minerals in the land plus the loss by disturbance. If the sum of these items exceeded the value as building land, then Mr. Horn would be entitled to the difference. In other words, the Court of Appeal decided that in a case where the value of the land is increased by reason of its suitability for purposes other than those to which the vendor is putting it, he is not entitled to compensation for disturbance unless the increase in price is less than the compensation for disturbance. The dissenting member of the Court of Appeal, Goddard, L.J. (as he then was) agreed with the judge of first instance (Atkinson, J.) that the arbitrator was wrong in rejecting the claim for disturbance. Lord Goddard's view was that 'while rules 1 and 2 require that, in assessing the actual value of the land, the owner is to be regarded as a willing seller, rule 6 recognises that in fact he is not. If the owner of a house puts it up for sale, he knows that, to obtain the market price, he must give vacant possession, and he will not expect to get, in addition to the price, a sum to compensate him for the expense of removal. Disturbance implies that something is taking place against the will of the person disturbed. If an owner is expelled from his house, the expense he is put to in removal is in no way connected with the value of his house. It is a loss which he has suffered, as it seems to me, by being expelled, whatever the value of the house may be. . . . If he intended to remain, he is disturbed by being obliged to sell against his will, and I can see no reason why he should not be compensated under rule 6 on this account'.[62] Personally, I think the reasons stated by Lord Goddard are sounder than those of the majority judges, but unless and until the judgment of the Court of Appeal is overruled by either the House of Lords or Parliament the law—no matter how unfair it may be—is that laid down by the majority judgments of the Court of Appeal. The position has become of much greater importance since 1941 by reason of the new and wide powers of compulsory acquisition which have been conferred since then, and also by reason of the State ownership of development rights in all land created by the Town and Country Planning Act, 1947. Before July 1, 1948, the value attributable to potential future development of the land was part of the global figure of the compensation payable, but as since that date no landowner can develop his land (with very few exceptions) without obtaining planning permission, *i.e.*, his rights of ownership no longer include the right to develop, he is no longer entitled to claim compensation for loss of potential future development should his land be compulsorily purchased from him.[63]

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[62] [1941] 1 All E.R. 480, at p. 499.

The Town and Country Planning Act, 1947, has the effect of restricting the value of the land to what a willing purchaser would pay on the footing that he intended to use the lands for the same purpose that the vendor was lawfully using it at the date of service of the notice to treat. Under the Lands Clauses Acts the basis of compensation was the value of the land to the owner at the date of service of the notice to treat, but the Acquisition of Land (Assessment of Compensation) Act, 1919, changed the basis to the amount the land might be expected to realise if sold in the open market by a willing seller,[64] and the amount of compensation has since been still further reduced by the loss of development rights. All this presumably has been done in the public interest, but taking the long view, will it prove to have been to the public advantage?

There is another provision in the Town and Country Planning Act, 1947, which strikes me as being unjust, and that is the provision that no account shall be taken, in calculating the value of an interest in land designated by a development plan under the Act as subject to compulsory acquisition, of any depreciation in the value of that interest which is attributable to the designation.[65] I suppose no one would dispute that as soon as land is designated as being subject to compulsory acquisition, the value of that land is immediately reduced because of the designation. Why should the landowner not be entitled to recover that loss when his land is, in fact, compulsorily acquired? If the board of directors of a company deliberately do something which they know will result in an immediate fall in the value of the company's shares, and

[63] Town and Country Planning Act, 1947, s. 51, enacts the basis of assessment for compulsory acquisition after July 1, 1948.

[64] Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2 (2).

[65] Section 51 (3).

while the shares are standing at this lower value they make personal purchases of the shares, their conduct is not generally regarded as being very moral. Is there any real difference between the two cases? It is important that the State should maintain a high standard of morality in all its activities: example is always better than precept. We appear to favour public authorities more than the Belgians, as they 'accept that a person may be relieved of his property, but the damage inflicted upon him must be redressed to the uttermost farthing. In this way it often happens that, with us [the Belgians] expropriation may be a very good thing from the owner's point of view'.[66]

A matter which has always been important to landowners, and which will increase in importance, *e.g.*, every time a development plan under the Town and Country Planning Act, 1947, comes into operation, is that of reinstatement. Under the Lands Clauses Consolidation Act, 1845,[67] the value of the land compulsorily acquired was the actual or potential value to the owner estimated at the date of service of the notice to treat. The market value was regarded as the minimum value, as land is often worth more than its market value to a particular owner. It was assumed, too, that an unwilling owner in actual possession would not be prepared to part with his land unless he were compensated for being disturbed, and such an owner was entitled to compensation for the expenses of removal and for any loss suffered by the disturbance of his business, because, although compensation for disturbance is not specifically given by any provision in the Act, it was considered right and proper to allow the claim as part of the value of the land to the owner. Attention has already been drawn to the alteration made by the Acquisition of Land (Assessment of Compensation) Act, 1919, in the basis of compensation, but the 1919 Act expressly provides that the assessment of compensation for disturbance or any other matter not directly based on the value of the land is not to be affected,[68] and this is still the position. An owner is, therefore, entitled to full compensation for all such loss he may suffer by

[66] M. Victor Bure, *op. cit.*, p. 15. On the other hand, if there is no expropriation then, under Belgian law, there is no compensation: Bure, *op. cit.*, pp. 17 and 19. It appears, therefore, that under Belgian law there is no compensation for injurious affection, as there is under English law.

[67] Section 63.

[68] Section 2 (6).

being compulsorily deprived of his land. An important case in this connection is *Metropolitan Railway and Metropolitan District Railway* v. *Burrow*.[69] Messrs. Burrow had carried on their business in premises let at a rack rental. Unfortunately the business had been carried on at a loss. The railway company compulsorily acquired Messrs. Burrow's premises, and as Messrs. Burrow wished to continue their business they removed it to other premises at an increased rental. They were unable to obtain other suitable premises at a cheaper rate, and they claimed compensation on the basis of being reinstated in the new premises. The question of compensation came before the Recorder of London and a jury, who assessed the compensation on the basis contended for by Messrs. Burrow. The railway company appealed to the Divisional Court, the Court of Appeal and the House of Lords, and in no court was it successful. The House of Lords dismissed the appeal without calling on counsel for Messrs. Burrow and said the appeal should never have been brought.

The railway company urged before the Recorder that compensation in respect of the removal could not be properly given under any circumstances. The Recorder refused to accept that view, and told the jury that Messrs. Burrow 'have resolved to remove their business, and if you are of opinion that the premises which they have taken to replace the others were reasonably procured at a reasonably fair price, and that they could not do reasonably better than they have done, then you are bound to compensate them in respect of that removal'.[70] The jury were of that opinion, and so displeased was the railway company that Mr. Justice Mathew confessed he was 'somewhat surprised at the impatience displayed by the railway company at the result of the inquiry'.[71] The Master of the Rolls said he decided the case upon this ground, and judicially only upon the ground 'that there was certainly evidence that it would be reasonable to carry on this business by removing it, that the business was not in such a condition that it would necessarily always be a loss; and if it be a question for the jury whether it was reasonable or not to carry on the business, there was evidence that it was reasonable '.[72] The Lord Chief Justice, in the Divisional Court, said that if the only way in which Messrs. Burrow could equally advantageously carry on the business which the railway company destroyed was by taking premises worth so much more, and that was anticipated, he could not see that there was anything wrong in leaving to the jury the value of the sum of money which it would cost to replace Messrs. Burrow in the same position from which the railway company had turned them out. It might be said that Messrs. Burrow were placed in a better position,[73] but their answer is 'We cannot help that. We do not want to be in a better position; we are willing to stay where we are. You are not willing we should stay; you turn us out. The only place that you can put us into is a place that will cost us so much more, and we do not want to pay it '.[74] As the Lord Chief Justice said, why is not that the damage Messrs. Burrow sustained by the railway company's action? He was unable to see what other was the fair estimate of that damage.[75]

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[69] (1884) *The Times*, January 24, 1884 (C.A.); affirmed House of Lords, *sub nom., Metropolitan and Metropolitan District Railways* v. *Burrow, The Times*, November 22, 1884. A full note of the judgment is given in Cripps, *Compulsory Acquisition of Land*, 1950, Vol. 2, pp. 1811–1817.

[70] Cripps, *op. cit.*, p. 1815.

[71] *Ibid.*, p. 1813.

The principle of reinstatement is that the owner cannot be placed in as favourable a position as he was in before the exercise of compulsory powers, unless such a sum is assessed as will enable him to replace the premises or lands taken by premises or lands which will be to him of the same value. As Lord Justice Bankes said in *A and B Taxis Ltd.* v. *The Secretary of State for Air,*[76] 'It must depend on the facts whether in a particular case the principles of reinstatement as stated apply; and the material considerations would seem to be first the nature of the business which is to be displaced; it would be unreasonable to incur great expense in reinstating a business which could only be carried on at a loss; secondly, the time during which the business is to be displaced. If the time was very short it might be unreasonable to incur any expense in reinstating it'.

If an owner is entitled to have the principle of reinstatement applied to his case, then he will obtain compensation not only for any increased rental and other expenses reasonably incurred

[72] Cripps, *op. cit.*, p. 1815.

[73] Cf. the Belgian position, *viz.*, 'expropriation may be a very good thing from the owner's point of view', n. 66.

[74] Cripps, *op. cit.*, p. 1812.

[75] *Ibid.*

[76] [1922] 2 K.B. 328, at p. 336.

in taking reasonably convenient new premises for the purpose of carrying on his business, but also for the cost of removing his furniture and goods, and for any depreciation in the value of his stock consequent on its removal or on a forced sale thereof, if that is the only practicable course. If, too, in consequence of being compulsorily deprived of his premises, the goodwill of the owner's business or profession is reduced in value, then he is entitled to compensation to cover such loss. In *R.* v. *Scard*[77] a solicitor was given compensation for loss of business owing to disturbance, although he only removed to premises in the same street.

But, having regard to existing conditions, can one honestly say that the law is fair and just to owner-occupiers of commercial, industrial and professional premises who are compulsorily deprived of their premises? Displaced owner-occupiers of premises of this kind find it extremely difficult to obtain other suitable premises because of the acute shortage of premises, and the question arises whether the law should not be altered so as to provide that, in appropriate circumstances, the acquiring authority should be compelled to find suitable alternative accommodation for such persons before the premises are actually acquired by the authority. It must be admitted at once that such an obligation would reduce the number of compulsory acquisitions of land, but that might not be a bad thing. The community has no right to enrich itself by deliberately taking the property of any of its members in such circumstances that it is not playing fair with those members. That this should be a controlling factor is partially recognised by the Town and Country Planning Act, 1947, which enacts that where land is compulsorily purchased for planning purposes, and the carrying out of redevelopment on any such land will involve the displacement of persons residing in premises thereon, it shall be the duty of the acquiring authority, in so far as there is not other residential accommodation suitable to the reasonable requirements of those persons available on reasonable terms, to secure the provision of such accommodation in advance of the displacements from time to time becoming necessary as the redevelopment proceeds.[78]

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[77] (1894) 10 T.R. 545.

[78] Town and Country Planning Act, 1947, Schedule 11, s. 30 (1). This provision is wider than that in the Housing Act, 1936, s. 137, as it is not restricted to providing alternative accommodation for persons of the working class, whereas that under the Housing Act, 1936, is so restricted.

There is, therefore, a statutory duty to provide suitable alternative residential accommodation, but not suitable alternative business premises. This can be a great hardship to, *e.g.*, small traders, who may be deprived of the means whereby to earn their livelihood, and surely the law should be altered so as to give such an owner-occupier the right to appeal to an independent tribunal for a ruling as to whether in his particular case he should be entitled to be provided with suitable alternative accommodation before he is evicted from his premises, a ruling favourable to the owner-occupier to be legally binding on the acquiring authority.

Both the Housing Act, 1936,[79] and the Town and Country Planning Act, 1947,[80] provide that the acquiring authority may pay to any person who is displaced as a result of the compulsory acquisition such reasonable allowance as the acquiring authority think fit towards his expenses in removing, and to a person carrying on any business in a building from which he is so displaced they may pay also such reasonable allowance as they think fit towards the loss which, in their opinion, he will sustain by reason of the disturbance to his business consequent on his having to quit the building, and in estimating that loss they shall have regard to the period for which the premises occupied by him might reasonably have been expected to be available for the purpose of his business and the availability of other premises suitable for that purpose. The Housing Act, 1936, further provides[81] that where, as a result of action taken by a local authority and relating to clearance areas or to improvement areas, the population of the locality is materially decreased, they may pay to any person carrying on a retail shop in the locality such reasonable allowance as they think fit towards any loss involving personal hardship which, in their opinion, he will thereby sustain, but in estimating any such loss they shall have regard to the probable future development of the locality. These statutory provisions enable an acquiring authority to make payments which might otherwise be *ultra vires* the authority, but it is not bound to make them, and my view is that the law should be altered so as to give a displaced person a legal right to receive such payments in all circumstances.

[79] Part 3, s. 44 (1).

[80] Schedule 11, s. 30 (5).

[81] Part 3, s. 44 (2).

LACK OF EFFECTIVE SAFEGUARDS

I have on more than one occasion referred to the necessity for an independent body, such as a Supreme Court of Administration, with power, *inter alia,* to inquire into the motives for an administrative decision, and to annul an executory administrative decision.[82] One or two things have recently happened which I think confirm the correctness of my view.

In a letter to *The Times* newspaper[83] Lord Iveagh stated that early in 1950 notice of two compulsory orders on behalf of the Forestry Commission was served in respect of 650 acres of his Elveden Estate. As most of this area was similar to that which he had successfully reclaimed for food production, objections were lodged by interested parties, and in October, 1950, a local public inquiry was held. At this inquiry no evidence was offered by the Forestry Commission to justify their action, and no cross-examination of their representative as to the reasons for it was permitted. As a result of the inquiry the Minister decided to proceed with the compulsory purchase so far as 350 acres were concerned, and a confirming Bill was introduced to give effect to his decision. Petitions were immediately lodged against the Bill, and in July, 1951, a Select Committee of the House of Commons sat to consider it. The onus, this time, was on the Minister to prove his case, and after hearing the evidence in support of it and without even calling on the petitioners the Committee decided unanimously to throw out the Bill. It is important to note that the relevant facts were only brought out, and justice obtained, because (1) Lord Iveagh was able to afford the expense of petitioning in Parliament; and (2) the Forestry Act under which his land was sought to be acquired compulsorily provides for reference to Parliament on petition. The vast majority of cases of compulsory acquisition are governed by the procedure laid down by the Acquisition of Land (Authorisation Procedure) Act, 1946, with consequently the Minister as the confirming authority and no recourse to Parliament. No doubt Ministers want to be fair, but human nature being what it is, it is too much to expect Ministers always to have a proper perspective of the matters at issue and, further, to hold the scales properly balanced between the rights of the private owner and the interests of the community. If it had not been possible for a parliamentary Select Committee to have considered the *Iveagh Case,* then 650 acres of agricultural land would have been wrongfully lost to agriculture and, what is also important, a private owner would have been, on the facts, unjustly compelled to give up his rights.

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[82] See, *e.g.*, 'New Town Planners and the Law' (1951) 4 *Current Legal Problems,* at p. 367.

[83] July 26, 1951.

The work done by the Select Committee in the *Iveagh Case* could be done by a permanent independent body in all appropriate cases, and the establishment of such a body would go far to reassuring public opinion that a reasonable safeguard had been provided against abuse of powers of compulsory acquisition.

Again, the case of *Wiltshire Standing Joint Committee* v. *Wiltshire County Council*[84] is the kind of case which it would be appropriate for a body such as a Supreme Court of Administration to adjudicate upon. In that case the Wiltshire Standing Joint Committee passed a resolution to the effect that it approved a specific piece of land on which to build a new police station and that the County Council be asked to exercise their compulsory powers for the acquisition of this site.[85] The County Council asked the Court to say whether it has any general discretion to refuse to acquire compulsorily for police purposes a particular piece of land which the Standing Joint Committee has requested it so to acquire. Further, if the Court decided that the County Council has no such discretion, then whether it has such discretion if the County Council is reasonably satisfied that other and equally suitable sites are available for the police purposes in question. The Court held that in none of the circumstances has the County Council any such discretion.

It is not doubted that the decision of the Court was a proper interpretation of the law. The real issue from the point of view of the public—and this was not a matter upon which the Court had power to adjudicate—was whether the exercise of the compulsory power of purchase in the way demanded by the Joint Standing Committee was fair and just. Suppose, for the sake of argument, that a more suitable site was available than that selected by the Standing Committee. Is it fair and just that the Standing Committee should, legally, be able to compel the County Council to purchase the more unsatisfactory site? A dispute of this kind should obviously be referred to an independent body with power to inquire into the reasons for the desire of the Standing Committee to acquire a specific piece of land, and the reasons of the County Council for not wishing to do so. Whoever then happens ultimately to be the unlucky landowner will know that a proper inquiry has been held, and he may, in consequence, feel less bitter about being compulsorily deprived of his land.

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[84] [1951] 1 All E.R. 1041.

[85] By the Police Act, 1946, s. 15, as amended by the Acquisition of Land (Authorisation Procedure) Act, 1946, s. 6 (1) and Schedule 4, a County Council may be authorised by the Minister of Housing and Planning to purchase compulsorily any land which is required for the purpose of any of the functions of the police authority for the county.

This independent body, too, could be given jurisdiction to decide whether a local authority is, in any specific case, entitled to acquire compulsorily land surrounded by, or adjoining, a clearance area, so as to secure a cleared area of convenient shape and dimensions, or for the satisfactory development or user of the cleared area. Its jurisdiction, too, should also enable it to say in any given case whether the acquiring authority should be under a legal duty to find suitable alternative accommodation for, say, owner-occupiers whose business premises are being compulsorily purchased for planning purposes. '. . . everybody recognises that the acquisition of lands involves matters of policy and administration which differentiate it from causes between individuals in the courts. But justice, propriety and fair dealing demand certain essentials and, pending a complete review of the procedure, the immediate and minimum reforms should be the recognition of full rights of cross-examination and the publication of the report of the person holding the inquiry or hearing, or at least the right of objectors to inspect it'.[86] In the United States of America every agency[87] must publish or, in accordance with published rules, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents).[88]

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[86] Mr. Derek Walker-Smith, M.P., and a lawyer—letter to *The Times* newspaper, August 2, 1951.

[87] 'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia—American Administrative Procedure Act, 1946, s. 2.

Dominant current opinion recognises the necessity for Parliament to increase the number of authorities with power to acquire land compulsorily, while at the same time it holds to the belief that confiscation without a genuine *quid pro quo* is unjust. Parliament should never depart from the principle that legislation should reflect prevailing public opinion, and should never allow any authority with power to acquire land compulsorily to violate the maxim: Be not covetous: do not steal.

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[88] American Administrative Procedure Act, 1946, s. 3 (*b*). The section does not apply to the extent that there is involved (a) any function of the United States requiring secrecy in the public interest or (b) any matter relating solely to the internal management of any agency: *ibid.*

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HOSPITALS
AND THE
NATIONAL HEALTH SERVICE ACT

O. R. Marshall

The object of the National Health Service Act, 1946, was the establishment of a comprehensive health service for England and Wales.[1] The services provided by the Act are many and varied, but the scope of this paper will be confined to an examination of those provisions in the Act which deal with hospitals and hospital services. And for the purpose of this examination it is proposed to consider the impact of the legislation upon two branches of English law, namely, the law of property and the law of tort.

THE LAW OF PROPERTY

It will be convenient to summarise very briefly the effect of the property provisions of the Act before considering in detail some of the specific problems which have arisen. On July 5, 1948, all hospitals in England and Wales, both voluntary and public authority, were transferred to and vested in the Minister of Health, together with their premises, equipment, furniture and other moveable property.[2] Their liabilities were also taken over by the Minister and their endowments were vested in him freed from any pre-existing trust. In the case of teaching hospitals, their endowments were transferred to the appropriate Boards of Governors, but were similarly freed from any pre-existing trusts.[3] Endowment funds transferred to the Minister were pooled in a Hospital Endowment Fund [4] and, after discharge of liabilities, were allocated among the Regional Hospital Boards which were required to ensure that as far as possible the objects for which the endowments were used before July 5, 1948, were not prejudiced by this freedom from pre-existing trusts. The Boards of Governors of teaching hospitals which received their endowments direct had a similar obligation imposed upon them.

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[1] The National Health Service (Scotland) Act was later passed to make provision for Scotland.

[2] National Health Service Act, 1946, s. 6; for a transfer of liabilities under this section see *Cassidy* v. *Ministry of Health* [1951] 1 All E.R. 574.

[3] *Ibid.*, s. 7.

[4] *Ibid.*, s. 7 (4).

With this brief summary in mind let us proceed to investigate the effect of the Act on the following types of problem:

1. Gifts to hospitals made by an instrument taking effect before the appointed day [5] for the coming into force of the Act.
2. Gifts to hospitals by wills executed before the appointed day but taking effect after the appointed day.
3. Gifts made and taking effect after the appointed day.

Gifts to hospitals made by an instrument taking effect before the appointed day

When the National Health Service Bill was before Parliament it was felt that the freeing of hospital endowments on the appointed day from pre-existing trusts would have the effect of preventing donors from making gifts to hospitals in the interval between the Act receiving the Royal Assent [6] and its coming into force. Accordingly it was provided [7] that where an endowment was given after November 6, 1946, and before July 5, 1948, to a non-teaching hospital upon trust to provide either (a) for the administration of the property as a capital fund separate from the general funds of the hospital, or (b) for the application of the property for some specific object distinct from the general purposes of the hospital and involving expenditure of a capital nature, the endowment instead of being transferred to the Minister and pooled in the Hospital Endowment Fund was on the appointed day to be transferred to and vested in the Hospital Management Committee for the use of the hospital, and the Hospital Management Committee would continue to apply the gift locally according to the general or specific intention of the donor. No similar provision was made for gifts to teaching hospitals.

There was also another method whereby conveyancers could ensure that gifts made to hospitals before the appointed day were not transferred to the Minister. This arose from the definition of the word endowment in the Act.[8] In ordinary hospital practice before the Act an endowment meant a gift to a hospital subject to a trust attached by the original donor whereby the capital of the fund could not be spent, but the income was to be applied to the general purposes of the hospital. Under the Act endowments are defined as interests in or attaching to shares, stocks, bonds, debentures and other securities, and any other personal property held by way of an investment; money including any credit banking account; and rights under any bill of exchange, promissory note, or gratuitous covenant for the payment of money. Any property therefore held by a hospital and any rents or profits arising from it are included in this definition but 'an equitable interest held for the purposes of a voluntary hospital in trust property *in which there are other equitable interests* shall not be deemed to be an endowment' for the purposes of this definition.[9] Accordingly it was open to conveyancers, where donors had doubts about the wisdom of endowments being transferred to the Minister, to create a trust under which the hospital and other distinct bodies had equitable interests. The interest of the hospital would not be an endowment and so it would not be transferred to the Minister and pooled in the Hospital Endowment Fund.

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[5] July 5, 1948.

[6] November 6, 1946.

[7] National Health Service Act, 1946, s. 7 (4) (proviso).

But though this method would enable the gift to escape the hands of the Minister, it would not prevent the equitable part interest of the hospital from being payable to the Boards of Governors in the case of teaching hospitals, or to the Regional Hospital Boards or Hospital Management Committees in the case of any other hospitals. In this respect *Re Kellner's Will Trusts*[10] and *Re Gartside*[11] are very instructive cases. In *Re Kellner's Will Trusts* the testatrix, who died on June 23, 1948, had by her will dated June 18, 1948, devised and bequeathed her residuary real and personal estate as to two parts thereof on trust for the Cancer Research Institute, Fulham Road, and the Royal Cancer (Free) Hospital, Fulham Road. The Royal Cancer Hospital was a corporation incorporated by Royal Charter and the Cancer Research Institute was owned and controlled by the hospital. Under the Act the hospital was designated a teaching hospital, and the affairs of the hospital and the institute were conducted by a Board of Governors.[12] The question was whether the Act had specifically provided for the destination of the testamentary gifts to the Royal Cancer Hospital, and if not, how the property given to that charity was to be disposed of. Both Harman, J., in the Court of first instance and the Court of Appeal [13] were agreed that neither section 6 nor section 7 of the Act applied. Section 6 operated to transfer all rights to which governing bodies of voluntary hospitals were entitled immediately before the appointed day, being rights acquired solely for the purpose of managing or otherwise carrying on the business of the hospital. It was held that . . . 'the rights of the residuary legatees (namely the Royal Cancer Hospital) are rights to have the estate of the testatrix administered according to law, either by the personal representatives or by the Court, and on completion of the administration to have the balance remaining in the executors' hands distributed in due proportions'.[14] As a matter of plain English the rights of the residuary legatees were not rights acquired solely for the purposes of managing the hospital. The next question was whether the rights of the residuary legatees were caught by section 7 of the Act. This section operated to transfer all endowments of voluntary hospitals designated as teaching hospitals held immediately before the appointed day to the relevant Board of Governors. The definition of endowment included 'any other personal property held by way of an investment'. It was held that the rights of the residuary legatees could not be properly so described. But even if this were not so they were excluded by the proviso to section 7, which excludes from the definition of endowment 'an equitable interest held for the purposes of a voluntary hospital in trust property in which there are other equitable interests'. The rights of the residuary legatees were interests in the testatrix's assets in which other interests also subsisted, namely, the interests of the other individual legatees. At this point, however, Harman, J., and the Court of Appeal disagreed. Harman, J., said [15]: 'My

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[8] *Ibid.*, s. 7 (10).
[9] *Ibid.*, s. 7 (10) (proviso).
[10] [1949] 2 All E.R. 774 (C.A.) reversing Harman, J. [1949] 2 All E.R. 43.
[11] [1949] 2 All E.R. 546 (Chancery Court of the County Palatine of Lancaster).

[12] The National Health Service (Designation of Teaching Hospitals (No. 2)) Order, 1948 (S.I. 1948, No. 979).

[13] Evershed, M.R., Somervell, L.J., and Vaisey, J.

[14] *Per* Harman, J. [1949] 2 All E.R. 48.

[15] *Ibid.,* at p. 46.

attention was drawn by counsel, section by section, to the provisions of the Act, and I read them with a bewilderment which ripened finally into despair when the conclusion was forced on me, from which I see no escape, that by some mischance the legislature has so framed the clauses of this Act as to leave outside it charitable legacies of the nature here in question. The Act in this respect is almost a miracle of ineptitude '. The section to which the learned judge was referring was section 60 (1) which provides : ' Where property [16] other than property transferred to the Minister or to the Board of Governors of a teaching hospital or to a hospital management committee under section 6 or section 7 of this Act, is held on trust immediately before the appointed day, and the terms of the trust instrument authorise or require the trustees, whether immediately or in the future, to apply any part of the capital or income of the trust property for the purposes of any hospital to which section 6 of this Act applies, the trust instrument shall be construed as authorising or, as the case may be, requiring the trustees to apply the trust property, to the like extent and at the like times, for the purpose of making payments whether of capital or income (a) in the case of a hospital designated as a teaching hospital or included in a group of hospitals so designated, to the Board of Governors of that teaching hospital ; (b) in the case of any other hospital to the Regional Hospital Board for the area in which the hospital is situated or to the Hospital Management Committee for the hospital or for the group of hospitals in which it is comprised '. In view of the scathing criticism of the learned judge of the ineptitude of the Act one would have expected a minute and detailed analysis of this section. But the learned judge dismissed it very summarily.[17] ' In this section . . . the expression " the trust property " means the residue of the estate and the question is whether the terms of the trust instrument (*i.e.*, the will) require the trustees to apply a part of the capital for the purposes of the Cancer Hospital. In my judgment, the language is wholly inappropriate and the section has nothing to do with the case '. The Court of Appeal did not agree with this concise statement. Evershed, M.R., subjected the section to a careful analysis, and came to the conclusion that there were four prerequisites to the operation of the section, and that these were satisfied in the instant case.[18] First there must be identifiable property. The property was the estate of the testatrix. Secondly, the property must be held on trusts which were operative immediately before the appointed day. This was so, and the fact that probate had not been taken out until after the appointed day made no difference. Thirdly, the trust must be constituted by a trust instrument. This test was also satisfied; a single trust instrument was not necessary. Trusts imposed partly by a will and partly by the operation of the Administration of Estates Act, 1925, were trusts constituted by a trust instrument for this purpose. Fourthly, the trust instrument must 'authorise or require the trustees, whether immediately or in the future, to apply any part of the capital or income of the trust property for the purposes of any hospital'. These words were apt to cover the case of direct payment to the hospital. The section therefore covered precisely the instant case, and the trustees were accordingly bound to apply the shares of the testatrix's residuary estate in paying the capital and income thereof to the Board of Governors of the Royal Cancer Hospital.

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[16] By s. 79 the word ' property ' includes rights unless the context otherwise requires.

[17] [1949] 2 All E.R. 43, at p. 49.

Before *Re Kellner's Will Trusts*[19] went to the Court of Appeal the decision in *Re Gartside*[20] had foreshadowed its result. In that case the trustees of a will held part of the testator's residuary estate on trust immediately before the appointed day for the Manchester Children's Hospital (a non-teaching hospital) and the St. Mary's Hospital, Oxford Road, Manchester (a teaching hospital). The trustees of the will were also entitled to receive certain funds from the trustees of a settlement and to hold part of the funds so received on identical trusts for the hospitals. The question was the destination of the shares of residue. The attention of Sir Leonard Stone, V.-C., was called to the decision of Harman, J., in *Re Kellner's Will Trusts*[21] to the effect that section 60 (1) of the Act did not apply to such gifts. The learned Vice-Chancellor said[22]: 'Harman, J., was dealing with an unadministered estate, and in view of what he had already said with regard to the rights of residuary legatees in an unadministered estate, I am forced to the conclusion that it was those rights which he held to be excluded by the context from the definition of " property " in section 79. If it be not so, I should, with the greatest deference to the learned judge, feel unable to follow the reasoning founded on finding within section 60 a context which excludes all rights. . . . In my judgment section 60 is to be read from the point of view of the trustees '. He therefore declared that the trustees were to make payment to the relevant Hospital Board and Board of Governors who were, so far as was practicable, to apply the funds for the general purposes of the hospitals. When *Re Kellner's Will Trusts* was reversed, the Court of Appeal took the same view of section 60 as did the learned Vice-Chancellor, namely, that it must be read from the point of view of the trustees and not from that of the residuary legatees. Accordingly, the distinction which the learned Vice-Chancellor felt himself bound to make between unadministered and administered estates is no longer relevant. The sole question is whether property, including rights, is held on trust before the appointed day and the trust instrument requires the trustees to apply it for the purposes of any hospital. In that case the trustees must make payment after the appointed day to the relevant Hospital Board or Board of Governors.[23]

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[18] [1949] 2 All E.R. 774, at pp. 781–782.

[19] [1949] 2 All E.R. 774.

[20] [1949] 2 All E.R. 546 (Chancery Court of the County Palatine of Lancaster).

[21] [1949] 2 All E.R. 43.

[22] [1949] 2 All E.R. 546, at p. 550.

Another interesting case on these provisions of the Act is *Ministry of Health* v. *Fox.*[24] It will be remembered that section 6 (1) of the Act transfers to the Minister on the appointed day all interests in or attaching to premises forming part of a voluntary hospital and in equipment, furniture or other moveable property used in or in connection with such premises being interests held solely for the purposes of that hospital. Section 7 (4) transfers to the Minister all endowments of a voluntary hospital to which section 6 relates being endowments held immediately before the appointed day, and section 7 (10) defines endowments as consisting of property of specified descriptions being property held solely for the purposes of that hospital. In the instant case the trustees of a maternity home held its property and endowments on the appointed day on trust for the home, but under the trust deeds they had power to use the property and endowments for other charitable purposes within their discretion. The question was whether the property and endowments passed to the Ministry of Health. It was held that the words 'held by trustees solely for the purposes of that hospital' referred to the purposes for which the property was *in fact* being held on the appointed day. The power to divert to other purposes was accordingly irrelevant. Wynn Parry, J., was of the opinion that the words must, if possible, be given the same meaning throughout the Act. They occurred in section 6 (2) dealing with the transfer of hospitals vested in local councils. Since local councils can, within very wide limits, alter purposes for which they hold property, it would follow that section 6 (2) would never operate to transfer 'local council' hospitals unless regard was paid to the factual situation, and the power to divert was disregarded. In *Re Marjoribanks' Indenture,*[24a] however, the Court of Appeal held that the decision in *Ministry of Health* v. *Fox,* though correct on its facts, went further than was necessary for the solution of the point at issue. The Court of Appeal expressed the view that if regard was paid to the factual situation alone as at the appointed day, injustice might well be caused, for 'in a case in which land is held on trusts for the purposes of a hospital for some limited period and thereafter for some other public or private purposes, the effect of the Act would be to destroy those later interests which, in the case of private interests, would be equivalent to an expropriation for which no kind of compensation is provided'.[24b] Each case must therefore be determined on its own facts in such a way as to satisfy the requirements of common sense.

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[23] For further cases falling under s. 60 and not ss. 6 and 7, see *Re Hunter* [1951] 1 All E.R. 58, and *Re White* [1951] 1 All E.R. 528.

[24] [1950] 1 All E.R. 1050.

Gifts to hospitals by wills executed before the appointed day but taking effect after the appointed day

The cases already discussed illustrate the interpretation of particular sections of the Act. We come now to a second group of cases which raises a problem of general interest to the student of the law of trusts. The problem may be stated in the following way: A testator makes a will before the appointed day bequeathing a legacy to a particular named hospital. The testator dies after the appointed day, and the question is the destination of the legacy. Does the legacy lapse on the footing that the hospital has ceased to exist during the testator's lifetime, or is it payable to the Regional Hospital Boards, Hospital Management Committees or Boards of Governors under the Act as the case may be? And if it is so payable are these bodies free to apply the legacy for any hospital purposes they choose, or are they bound to use it according to the specific intention of the testator?

[24a] [1952] 1 All E.R. 191.
[24b] *Ibid.,* at p. 196.

Now it is well settled that (in the absence of a general charitable intention) a gift for a particular charitable purpose which has wholly failed in the lifetime of the testator is subject to the ordinary doctrine of lapse,[25] but it is equally well settled that so long as there are funds held in trust for the purposes of a charity the charity continues in existence and is not destroyed by any alteration in its constitution or objects made in accordance with law.[26] It will be seen therefore that if the gifts in question were to be upheld it would be necessary to show that (1) they were charitable, and (2) the institutions had so far survived the changes in constitution brought about by the National Health Service Act as to be capable of being identified with the institutions named and contemplated by the testator.

For some time after the Act came into force, doubts were expressed as to whether gifts to hospitals continued to be charitable. For example, *The Law Times* stated[27]: 'Under the National Health umbrella, as the Minister of Health calls this health service, the rich as well as the poor are supposed to shelter equally. It may accordingly be that gifts to hospitals are no longer charitable gifts at all'. This inference was completely misconceived, for though a trust for the relief of poverty cannot be charitable unless it excludes the rich,[28] a trust falling under the fourth head of Lord Macnaghten's classification is 'not the less charitable in the eye of the law, because incidentally it benefits the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly'.[29] It may well be that a gift to establish a hospital for aged millionaires[30] is not charitable, but it is a far cry from that to say that gifts for hospitals as constituted under the National Health Service Act are not charitable. The courts have had no hesitation in deciding that gifts for hospital purposes both before and after the Act are charitable. Thus in *Re Dean's Will Trusts*[31] the testator made a will which took effect before the appointed day. He bequeathed a legacy to St. Mary's Hospital, Paddington, for the purposes of that hospital, and directed that it should be used ' for the purpose of providing accommodation for the use of relatives who come from a distance of patients who are critically ill and the assistance of the work of the almoners '. He further provided that as from the appointed day the legacy should be applied by the Hospital Management Committee for those special purposes. Harman, J., started from the proposition that a gift for hospital purposes is a good charitable gift, held that the special purposes were hospital purposes, and accordingly there was a valid charitable bequest. Further, although the St. Mary's Hospital had been designated a teaching hospital, and so had no Hospital Management Committee, he directed the legacy to be paid to the Board of Governors of that hospital to be held by them *so far as* practicable on the trusts declared by the will. And *Re Frere*[32] expressly decided that it was not open to the Court to hold that a hospital had ceased to be a charity merely because of the passing of the Act of 1946.

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[25] *Re Rymer* [1895] 1 Ch. 19.

[26] *Re Faraker* [1912] 2 Ch. 488.

[27] (1946) 206 L.T. 124.

[28] *Re Gwyon* [1930] 1 Ch. 225.

[29] *Income Tax Commissioners* v. *Pemsel* [1891] A.C. 531, at p. 583.

[30] Cf. *Re Glyn* (1950) 66 (2) T.L.R. 510; *Re Bradbury* [1951] 1 T.L.R. 130, and *Re Robinson* [1951] Ch. 198.

It will be seen that though these cases uphold as charitable a gift for hospital purposes they did not settle the question of lapse, since in both cases the wills took effect before the appointed day. However there is a group of cases which show that in the problem posed there is no lapse. The first is *Re Morgan's Will Trusts*.[33] In that case there was a bequest of residue for the benefit of the Liskeard Cottage Hospital. After the date of the will, but before the death of the testatrix, the National Health Service Act came into force, and the building in which the hospital work was carried on together with the hospital's investments were vested in the Minister of Health. Further, the Plymouth, South Devon and East Cornwall Hospital Management Committee was created for the purpose of exercising functions with respect to the management and control of a group of hospitals which included the Liskeard Cottage Hospital. In these circumstances Roxburgh, J., held that this was a gift for the general purposes of the hospital, that is to say a gift for the work which at the date of the will was being carried on on the premises which the testatrix had described. That work was still being carried on, and this continuity of activity prevented the gift from lapsing. Then comes *Re Glass' Will Trusts*[34] where there was a bequest of a sum of money to the King Edward VII Memorial Hospital, Ealing, by a will made before the Act came into operation, and taking effect at the death of the testator after that date. Vaisey, J., treated the instant case of a gift direct to a named hospital as wholly indistinguishable from a gift for the benefit of a named hospital and, following *Re Morgan's Will Trusts*,[35] held that the legacy was payable to the appropriate Management Committee. There follows *Re Meyers*[36] where there were a number of gifts to hospitals, some incorporated and some not, to be added to their invested funds and not treated as income, the receipt of the treasurer or other proper officer to be a good discharge to the trustees of the will. The Act came into force after the will was made, but before the death of the testator. Two questions arose for decision. The first was whether or not there had been a lapse by reason of the coming into force of the Act before the testator's death. Secondly, if there was no lapse so far as the incorporated associations were concerned, whether the gifts went to those corporations which would have been the recipients of them before the appointed day or went to the new corporations created by the Act. Harman, J., came to the conclusion that there was no lapse. It was not a condition precedent to the validity of the gifts that any of the hospitals should have invested funds or have the power to treat the bounties given to them as capital and not income. Nor was there any lapse because for the moment there was no officer entitled to give a receipt. Accordingly, the gifts to the unincorporated hospitals were payable to the relevant Regional Hospital Boards or Hospital Management Committees. The gifts to the incorporated bodies were payable not to the old corporations (the continued existence of which was affirmed in *Re Kellner*[37]), but to the relevant board or committee, for ‘ there is no absolute rule that once you have the right words used to name a given person, whether juridicial or natural, that must exclude all other considerations ’.[38]

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[31] [1950] 1 All E.R. 882; see also *Re Hunter* [1951] 1 All E.R., and *Re White* [1951] 1 All E.R. 528.

[32] [1950] 2 All E.R. 513.

[33] [1950] 1 All E.R. 1097; see also *M'Clement's Trustees* v. *Campbell* [1951] S.C. 167.

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[34] [1950] 2 All E.R. 953 n.

[35] [1950] 1 All E.R. 1097.

[36] [1951] 1 All E.R. 538.

[37] [1949] 2 All E.R. 774.

There remains the question whether the hospital boards which receive these legacies are free to apply them for any purposes they choose or whether they are bound to use them according to the specific intention of the testator. It is thought that the wishes of the testator must be respected. Counsel for the Hospital Boards made an admission to this effect in *Re Morgan's Will Trusts,*[39] and the order of the Court was framed on this basis. And similar orders were made in *Re Glass' Will Trusts*[40] and *Re Meyers*.[41] It is submitted accordingly that the admissions of counsel in these cases form part of the *ratio decidendi* and that if the Hospital Boards were now to argue otherwise, it would be difficult for them to show that the legacies would be used for the particular work which the testator intended to benefit. Accordingly the continuity of activity which is essential would be lacking and the doctrine of lapse might well apply.

Gifts made and taking effect after the appointed day

Section 59 of the Act empowers Regional Hospital Boards, Boards of Governors of teaching hospitals, and Hospital Management Committees ‘ to accept, hold and administer any property upon trust for any purposes relating to hospital services . . . ’. It is submitted that they can accept gifts for the services of a *particular* hospital, and that if the donor so limits the gift the condition cannot be disregarded.

THE LAW OF TORT

The question to be considered under this head is the extent of the liability in tort of Regional Hospital Boards, Hospital Management Committees and Boards of Governors of teaching hospitals. The problem is complicated by the still undetermined relation of the Crown Proceedings Act, 1947, to the National Health Service Act, 1946, and by the provisions of the National Health Service Act itself. Section 13 of the National Health Service Act, 1946, provides:

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[38] [1951] 1 All E.R. 538, at p. 541.

[39] [1950] 1 All E.R. 1097.

[40] [1950] 2 All E.R. 953 n.

[41] [1951] 1 All E.R. 538.

(1) A Regional Hospital Board and the Board of Governors of a teaching hospital shall, notwithstanding that they are exercising functions on behalf of the Minister [of Health], and a Hospital Management Committee shall, notwithstanding that they may be exercising functions on behalf of the Regional Hospital Board, be entitled to enforce any rights acquired, and shall be liable in respect of any liabilities incurred (*including liabilities in tort*), in the exercise of those functions, in all respects as if the Board or Committee were acting as a principal, and all proceedings for the enforcement of such rights or liabilities shall be brought by or against the Board or Committee in their own name.

(2) A Regional Hospital Board, Board of Governors or Hospital Management Committee shall not be entitled to claim in any proceedings any privilege of the Crown in respect of the discovery or production of documents, but this subsection shall be without prejudice to any right of the Crown to withhold or procure the withholding from production of any document on the ground that its disclosure would be contrary to the public interest.

This suggests the continued existence of cases in which hospital authorities may be liable in tort, but its apparent simplicity is deceptive, for it leaves open the question whether or not hospital authorities are Crown servants. If they are, section 13 does not help greatly, since it must be taken to have been impliedly repealed by the Crown Proceedings Act, 1947, which now applies to ' civil proceedings by or against the Crown ', or alternatively to ' civil proceedings to which the Crown is a party '. These expressions are defined to include, in general, proceedings to which any officer of the Crown as such is a party, and ' officer ' includes servant.[42] It therefore becomes necessary to determine whether or not hospital authorities are Crown servants.

Are hospital authorities Crown servants?

The arguments for and against Crown service are nicely balanced. Those in favour of Crown service may be summarised as follows :

(1) At the date of the National Health Service Act in 1946,

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[42] See Glanville Williams, *Crown Proceedings*, 1948, p. 6.

it was thought that hospital authorities under the Act were Crown servants, and, as at that date the Crown was not liable in tort, it was thought desirable to make special provisions for the tortious liability of hospital authorities. Section 13 accordingly does so.

(2) Section 13 imposes liability in tort (subject to the provisions of section 72 with which I shall deal later), notwithstanding the fact that hospital authorities exercise functions ' on behalf of ' the Minister of Health. It has been suggested that this phrase strongly suggests Crown service, and Denning, L.J., said in *Tamlin* v. *Hannaford*[43]: ' When Parliament intends that a new corporation should act on behalf of the Crown, it, as a rule, says so expressly, as it did in the case of the Central Land Board by the Town and Country Planning Act, 1947. . . . In the absence of any such express provision, the proper inference, in the case, at any rate, of a commercial corporation is that it acts on its own behalf, even though it is controlled by a government department '.

(3) Denning, L.J., says in *Freedom under the Law*[44] that doctors and dentists make the Crown liable under the Crown Proceedings Act.

(4) The power of the Minister to give directions to hospital authorities (the limit of which is unspecified) and to exercise control by regulations together with their complete financial dependence seems to indicate Crown service.

The arguments against Crown service may be summarised as follows:

(1) Section 13 of the Act is inconclusive. It may have been inserted *ex abundanti cautela* not to deprive Crown servants of the immunities of the Crown, but rather to make sure that the new hospital authorities which were taking over the functions of the old voluntary and local authority hospitals should be the proper defendants to an action in tort in the same way as their predecessors had been, though if the interpretation of section 72 of the National Health Service Act is the same as that of section 70 of the Scottish Act, their liability may be limited.

(2) The phrase ' on behalf of ' is not conclusive. An independent contractor acts on your behalf but he is not thereby

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[43] [1949] 2 All E.R. 327, at pp. 329–330.

[44] 1949, p. 74.

rendered your servant.[45] In any event one would have expected section 13 of the National Health Service Act to be expressly repealed by the Crown Proceedings Act, if such was the intention of the legislature. An implied repeal should only result from the most compelling reasons.[46]

(3) Denning, L.J.'s statement that doctors and dentists make the Crown liable under the Crown Proceedings Act is clearly too wide, for it covers general practitioners as well as hospital doctors. But even if it is restricted to the latter it lacks conviction since no reasons are given in support.

(4) The power of control which the Minister is competent to exercise is great but not conclusive. For one thing, hospital authorities are not a government department, and for another their powers do not fall within the province of government.[46a]

In my submission the arguments against Crown service should predominate not only because of their intrinsic merit but also because of the unfortunate consequences which would follow from holding hospital authorities to be Crown servants. For it should not be imagined that Crown service automatically imports liability. In fact, in order to establish liability on the part of the Crown it is necessary to show (1) that the tortfeasor is a servant of the Crown at common law,[47] and (2) that he is (a) directly or indirectly appointed by the Crown, and (b) wholly paid out of the Consolidated Fund, moneys provided by Parliament or any other fund certified by the Treasury for the purpose.[48] Now on the assumption that Regional Hospital Boards, and Boards of Governors of teaching hospitals are servants of the Crown, then their employees are also Crown servants, since at common law a servant appointed by a servant of the Crown acting in his official capacity is not a servant of the appointing servant, but is a servant of the Crown.[49] Further, being appointed by the members of the Board who are themselves on this hypothesis servants of the Crown, they can be said to be indirectly appointed by the Crown. But are they paid wholly out of the Consolidated Fund, moneys provided by Parliament, or any other fund certified by the Treasury for the purpose? The servants of hospital authorities clearly are, since the whole of the cost of the hospital services is borne by the Exchequer, but the servants of local health authorities equally clearly are not (unless the Treasury is willing to issue a certificate for the purpose), since midwives, health visitors, and home nurses are provided within the framework of the local health services, the cost of which is borne partly by the Exchequer and partly by the local rate. It would indeed be a confusing situation if the Crown were liable for the negligence of the hospital obstetrician, but not for that of the visiting midwife.

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[45] Glanville Williams, *op. cit.*, p. 27.

[46] *Ibid.*, p. 36.

[46a] For an exhaustive discussion of Crown service see Devlin, J., in *Bank Voor Handel En Schupvaart* v. *Slatford* [1952] 1 All E.R. 314.

[47] Crown Proceedings Act, 1947, s. 2 (1) (*a*).

[48] *Ibid.*, s. 2 (6).

[49] *Bainbridge* v. *Postmaster-General* [1906] 1 K.B. 178.

Again the liability of the Crown for the torts of its servants is somewhat restricted by the proviso to section 2 (1) of the Crown Proceedings Act, 1947, which reads as follows:

' Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) of this subsection in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate '.

So that if an ambulance driver in the course of his employment drives an ambulance in which his wife is lawfully a passenger, and negligently causes an accident in which his wife is injured, no action in tort may be brought against him by his wife, since section 12 of the Married Women's Property Act, 1882, prevents actions in tort by a wife against her husband except in certain cases which do not here concern us. And the husband not being liable the Crown would also escape liability. Yet a master other than the Crown would be liable in such circumstances. He would be liable to the wife for his own breach of duty committed through the instrumentality of his servant.[50]

These are some of the unfortunate consequences which would follow from holding hospital authorities to be Crown servants.[51] It is therefore refreshing to note that on September 15, 1949, the Ministry of Health issued a memorandum which clearly shows that they regard section 13 of the National Health Service Act, 1946, as being still in force.[52] The memorandum emphasises that section 13 renders Regional Hospital Boards and Hospital Management Committees liable as principals, and states that where the Ministry of Health is wrongly named as a defendant, the plaintiff should amend his writ, or a summons should be issued under Order XXI of the Rules of the Supreme Court for the striking out of the Ministry of Health. It is only if some persistent plaintiff refuses to amend his writ that a summons will be issued and the matter finally tested in the High Court.

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[50] *Smith* v. *Moss* [1940] 1 K.B. 424.

[51] For other examples not confined to hospital authorities but covering all the new public corporations, see Glanville Williams, *op. cit.*, *passim.*

[52] See 93 S.J., pp. 603–604.

If the above submissions are correct it seems that hospital authorities, not being Crown servants, enjoy none of the immunities of the Crown in respect of liability in tort. But they may be clothed with immunities of their own by the National Health Service Act itself. The immunity to which I refer is contained in section 72 which is as follows:

'Section 265 of the Public Health Act, 1875 (which relates to the protection of members and officers of certain authorities) shall have effect as if there were included among the authorities therein referred to a Regional Hospital Board, Board of Governors of a teaching hospital, a Hospital Management Committee, a local health authority and an Executive Council and as if any reference in that section to the Public Health Act included a reference to this Act'.

This appears innocent enough, so innocent in fact that it escaped debate in Parliament, but when one looks at section 265 of the Public Health Act, 1875, one finds that the scope of the protection is very wide. Section 265 provides as follows:

'No matter or thing done and no contract entered into by any local authority or joint board or port sanitary authority [to which we must now add Regional Hospital Boards, Boards of Governors of teaching hospitals, Hospital Management Committees, local health authorities, and Executive Councils] and no matter or thing done by any member of any such authority or by any officer of such authority or other person whomsoever acting under the direction of such authority shall if the matter or thing were done or the contract were entered into bona fide for the purpose of executing this Act [to which we must now add the National Health Service Act] subject them or any of them personally to any action liability claim or demand whatsoever; and any expense incurred by any such authority member officer or other person acting as last aforesaid shall be borne and repaid out of the fund or rate applicable by such authority to the general purposes of this Act'.

The exact scope of the immunity conferred by this section and its relation to section 13 of the National Health Service Act have not been judicially determined, since there do not appear to be any cases on section 265 of the Public Health Act, 1875, and there has been none in which the point has been raised since the coming into force of the National Health Service Act. However there is a similar protection conferred upon Boards of Management of hospitals in Scotland by section 70 of the National Health Service (Scotland) Act, 1947, the scope of which has been examined in four recent Scottish decisions. Section 70 of the Scottish Act applies with certain modifications section 166 of the Public Health (Scotland) Act, 1897, to Boards of Management of hospitals in Scotland, and in effect provides that:

(1) Boards of Management shall not be liable for damages for any irregularity committed by their officers in the execution of the National Health Service (Scotland) Act.

(2) Boards of Management shall not be liable in damages for anything done by themselves in bona fide execution of the Act.

(3) Every officer acting in bona fide execution of the Act shall be indemnified by the Board of Management under which he acts in respect of all costs, liabilities and charges to which he may be subjected.

(4) Actions against Boards of Management and their officers shall be commenced within twelve months from the time when the cause of action arose.

It will be seen that there are certain differences between the Scottish and the English Act. Thus in Scotland there is a time limit of twelve months for the commencement of an action; in England no time limit is provided by section 72.[53] In Scotland Boards of Management are not liable for any *irregularities* committed by their officers in the execution of the Act; in England no specific provision is made for irregularities. However it is accepted in Scotland that irregularity is not synonymous with negligence; it means irregularity in the procedure and method by which the powers given to a Board of Management and its officers are to be carried into effect.[54] There can be no doubt that Hospital Management Committees in England are protected in respect of such irregularities by the exemption from liability conferred upon them in respect of any matter or thing done bona fide for the purpose of executing the Act. In Scotland every officer acting in bona fide execution of the Act is entitled to an indemnity from the Board of Management under which he acts in respect of all costs, liabilities and charges to which he may be subjected. In England any expense incurred by any hospital authority member or officer of such authority or other person acting under the direction of such authority shall in respect of any matter or thing done bona fide for the purpose of executing the Act be borne out of the fund applicable to the general purposes of the Act. In Scotland the protection conferred by the Act extends only to anything done *by Boards of Management themselves* in bona fide execution of the Act, and it has been said that Boards of Management may therefore still be vicariously liable for the negligence of their servants.[55] In England the protection appears to be wider, since it covers not only any matter or thing done by hospital authorities themselves but also any matter or thing done by ' any member of any such authority or by any officer of such authority or other person whomsoever acting under the direction of such authority '. This would appear to exclude vicarious liability at any rate in those cases in which the matter or thing complained of was done in good faith for the purpose of executing the Act by a person acting under the direction of the hospital authority. Vicarious liability would then be restricted to cases in which the act complained of was done by a person who was not acting under the direction of the authority. However, vicarious liability is inappropriate to meet all cases. It may be that the plaintiff is unable to identify the particular defendant whose negligence he alleges to have caused the injury. A plaintiff does not prove his case by showing that he has been injured by the negligence of A, B, C and D, or of one of them, when the hospitals are liable for the negligence of C and D only and not for that of A and B. He must go further and show that C and D were the persons responsible for his injury.[56] Where vicarious liability is inappropriate, either because the plaintiff cannot identify the particular defendant or because the act complained of was done by a person acting under the direction of the hospital authority, the plaintiff may nevertheless still wish to allege negligence against the hospital authority itself arising from a breach of its duty to him in, for example, failing to provide a skilled and efficient nursing staff, and to maintain a safe system of treatment. In such cases the question is whether the immunity conferred by the Act protects the hospital authorities from a charge of negligence. Here the recent Scottish decisions provide a great deal of assistance.

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[53] It may well be that the time limit provided by the Public Authorities Protection Act applies to hospitals in their capacity as public authorities; this would only apply when they acted in good faith in the execution or intended execution of a public or statutory duty. It does not follow that the words 'execution of the Act' in section 72 of the National Health Service Act should be construed in the same way as the words 'execution of a public or statutory duty' in the Public Authorities Protection Act (see Lord Mackay in *M'Ginty's Case, infra*).

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[54] See *Davies' Tutor* v. *Glasgow Victoria Hospitals* [1950] S.C. 382; [1950] S.L.T. 392.

[55] *Ibid.*

The exemption from liability conferred by the Act has been pleaded as a defence to an action for negligence in four recent cases in Scotland.[56a] In three of these cases in the Outer House the defence succeeded, but in the fourth it was rejected both by the Outer and Inner Houses, and the previous decisions of the Outer House were distinguished. In *Callaghan* v. *Board of Management for Greenock and Districts Hospitals*,[57] Lord Guthrie held that the Act protected the Board of Management from liability in damages in a case in which a hot water-bottle placed in the cot of a child burst and caused severe injuries. In *Davies' Tutor* v. *Glasgow Victoria Hospitals*,[58] Lord Strachan held likewise in a case in which a patient was injured as a result of the application by a nurse of an excessively hot gag during an operation for the removal of the patient's tonsils. In one part of his judgment he expressed some doubt [59] about the correctness of this interpretation in view of the fact that section 13 of the National Health Service (Scotland) Act appears to impose liability in tort. But later he satisfies himself that there is no inconsistency, when he says: 'As I have held, however, that section 70 does not exclude liability for the negligence of an officer I am not forced to hold that the two sections are inconsistent'. And in a later case, *Morris* v. *Caithness Hospitals,*[60] Lord Strachan again held the exemption to be available when a patient sued a hospital for negligence, and this time he expressed no doubts whatsoever. This was the state of the authorities when *M'Ginty* v. *Board of Management for Glasgow Victoria Hospitals* [61] was heard in the Outer House by Lord Blades. This case did not involve a patient's action for negligence against the hospital, but was concerned with the liability of the hospital in its capacity as an employer of labour. The facts were that the plaintiff, who was an employee in a hospital laundry, suffered severe injuries to her hand as a result of feeding clothes to be pressed into an inadequately guarded machine. She alleged negligence at common law against the hospital authorities in that they had failed to give her adequate training before putting her to work at the machine, and also breach of statutory duty under the Factories Act, 1937,[62] in that they had failed to fix and maintain an adequate guard to the machine. Lord Blades held in the Outer House that the plaintiff was entitled to succeed in her action, and his decision was affirmed in the Inner House by a majority of two to one. Lord Blades expressed surprise that no Court had previously interpreted section 166 of the Public Health (Scotland) Act, 1897 (the forerunner of section 70 of the National Health Service (Scotland) Act, 1947), in the way contended for by the defendants. But the observation may be permitted that the absence of previous cases does not irrefutably point to liability rather than to an exemption from it. He then went on to say that the 'immunity applies and applies only,

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[56] As to the persons for whom hospitals are vicariously liable, see *Hillyer* [1909] 2 K.B. 280; *Gold* [1942] 2 All E.R. 237; *Collins* [1947] 1 All E.R. 633; *Cassidy* [1951] 1 All E.R. 574. In *Cassidy*, Denning, L.J., takes the view *obiter* that hospitals are liable for the negligence of consulting surgeons since it is the fact of their employment by the hospital which is crucial. The hospital cannot get rid of its duty of care by delegating performance to someone else whether servant or independent contractor. The Scottish cases support *Hillyer* and hold (1) that hospitals are not liable for the negligence of professional staff in professional as distinct from routine matters; (2) that during an operation the nurse is the servant of the surgeon in charge not of the hospital. See *Lavelle* v. *Glasgow Royal Infirmary* [1930] S.C. 123; [1931] S.C. (H.L.) 34; *Reidford* v. *Aberdeen Magistrates* [1933] S.C. 276.

[56a] Cf. *Walker* v. *Greenock and District Combination Hospital Board* [1951] S.L.T. 329 (Court of Session, Inner House), where it was held that the section did not confer immunity from liability for breach of contract.

[57] [1950] S.L.T. Notes 68.

[58] [1950] S.C. 382.

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[59] *Ibid.*, at p. 388.
[60] [1950] S.C. 390 n.
[61] [1951] S.L.T. 92.
[62] Sections 14 (1) and 16.

. . . to anything done [by the hospital authorities] in their public capacity as a Board of Management in the discharge of their public duties as these are defined in the Act and under the scheme; it does not relieve them of their duties as employers of labour or of liability for failure to discharge those duties. If it did there would be no purpose in enacting section 13'.[63] He concluded that running a hospital laundry, while no doubt of great convenience to the hospital, was not one of the defender's functions under the Act and scheme, and accordingly the hospital authorities were liable. It will be evident that in his desire to construe the exemption strictly, Lord Blades was confining it to cases in which hospital authorities were fulfilling duties which were imposed upon them by the Act, as distinct from exercising powers which were conferred upon them by the Act. And this is one of the grounds on which his decision was supported by the Inner House. Thus Lord Thomson said: 'The duties owed to servants are essentially different to those owed to the beneficiaries of the National Health Service Act. They do not spring from the Act but from the contract'.[64] And again: 'The ultimate test is whether the breach of duty at common law and the failure to obey the Factories Act arises out of the private relationship between the pursuer and the defenders or whether it springs from the duties imposed by Parliament on the defenders to provide certain health services for the public at large'.[65] And Lord Jamieson makes the same point when he says[66]: 'It may be useful that they should equip and maintain a laundry and in order to do so it is necessary that they employ servants. But while in employing such servants they may be acting under the Act they cannot, I think, be said to be acting in execution of it'. In making this distinction both Lord Thomson and Lord Jamieson relied upon the cases decided under the Public Authorities Protection Act, 1893, and particularly upon *Sharpington* v. *Fulham Guardians*[67] and *Bradford Corporation* v. *Myers*.[68]

The Public Authorities Protection Act imposes a time limit upon actions brought against public authorities in respect of an

[63] [1951] S.L.T. 92, at p. 95.
[64] *Ibid.*, at p. 99.
[65] *Ibid.*
[66] *Ibid.*, at p. 107.
[67] [1904] 2 Ch. 449.
[68] [1916] 1 A.C. 242.

act done bona fide, in the execution or intended execution of a public or statutory duty. It will be noted that the word ‘ duty ’ is used in this Act, and it is difficult to see why the cases decided under it should be extended by analogy to govern a totally different section in a totally different Act, which does not speak of ‘ execution of a duty ’, but ‘ execution of the Act ’ (which on a plain interpretation should include both the duties and powers imposed and conferred by the Act). And Lord Mackay, who dissented, seems to show that the Public Authorities Protection Act does not apply to any action on account of an act done under section 166 of the Public Health (Scotland) Act, 1897 (the forerunner of section 70 of the National Health Service (Scotland) Act, 1947).[69] The plain fact of the matter is that the words used in the two statutes are entirely different. In reaching their decisions, only Lord Thomson was troubled by the relation of section 70 to section 13 of the Act, and he felt that a wide exemption from liability under section 70 would deprive section 13 of practically the whole of its content. However both Lord Mackay and Lord Jamieson pointed out that section 13 does not define rights and liabilities; it merely provides that in appropriate cases hospital boards are the proper defendants and not the Crown. Nor does this interpretation of section 70 deprive section 13 of all its content, for it still leaves cases of *mala fides* and cases of vicarious liability to come within it. Both Lord Thomson and Lord Jamieson, however, thought that where negligence was proved, *mala fides* should be presumed. Lord Jamieson said[70]: ‘ It is only if they act in bona fide and in execution of the Act that they are protected, and I cannot think that acts done negligently can be said to have been done in such bona fide execution ’. This is a startling proposition for it has never before been suggested that good faith must necessarily produce reasonable action, or conversely that unreasonable action is exclusively the product of bad faith. If the legislature chooses to make good faith a defence to unreasonable conduct it can do, and has already done so, as students of the law of trusts will know from the leading case of *Re Vickery*.[71]

There emerges from this decision a conflict as to the true interpretation of section 70 of the National Health Service (Scotland) Act. Lord Mackay would interpret it to give a wide measure of protection. Lord Thomson and Lord Jamieson, on the other hand, would interpret it in such a way that all servants of any kind can sue without any restraint, but that members of the general public who are not servants cannot sue. As the law at present stands, the servant is preferred to the patient. This is a modern example of the old adage that you must not look a gift horse in the mouth. Hospital treatment is free, but you undergo an operation at your peril.

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[69] *Montgomerie & Co.* v. *Haddington Corporation* [1908] S.C. 127; S.C. (H.L.) 6; 15 S.L.T. 474, at p. 910.

[70] [1951] S.L.T. 92, at p. 107.

[71] [1931] 1 Ch. 572; section 23 (1), Trustee Act, 1925.

It is probable that a different interpretation would be given of section 72 of the English Act, for there are at least two methods of restricting the protection conferred by section 72. The first is by confining it to irregularities of procedure committed in carrying into effect the powers conferred by the Act. This interpretation would preserve the liability of hospitals in negligence. The second is by emphasising the intention of the legislature to protect members of hospital authorities from *personal* liability. This construction is assisted by the use of the word *personally* in the section. Members of hospital authorities are not to be *personally* liable in respect of anything done bona fide in the execution of the Act, but the hospital authority as such may nevertheless be fully liable in its *corporate* capacity. But whatever the position in England, that in Scotland is in urgent need of statutory reform.

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HIGH COURT CONTROL OF INFERIOR TRIBUNALS

D. C. Holland

The increasing tendency to entrust the duty of deciding disputes between individuals and between individuals and the State to bodies other than the regular courts of law raises familiar problems which have received considerable attention during recent years. The main problem which has attracted interest concerns those inferior tribunals popularly known as administrative tribunals. But there are, of course, many other types of tribunals also entrusted with the duty of deciding disputes, and the problems which concern administrative tribunals arise also in the case of these other inferior tribunals. Thus, in addition to administrative tribunals such as the Rents Tribunals, the Lands Tribunals, the National Health Service Tribunals and others,[1] there are those special tribunals which approximate to the regular courts of law but deal with only particular sections of the population, for example, courts-martial and ecclesiastical courts. There are also the disciplinary bodies set up under statutory authority to administer discipline in various professions, for example, the Medical Disciplinary Committee and the disciplinary committee of the Law Society. Finally, there are the voluntary bodies which have been established by groups of persons and organisations with the object of controlling the conduct of members within those societies, for example, the Jockey Club Stewards. Not only the administrative tribunals but all these tribunals possess extensive powers over which some degree of control is desirable. As Mr. Lloyd has said with reference to Lord Justice Denning's criticism of the fact that a doctor removed from National Health Service has a right of appeal only to the Minister[2]: 'This criticism must inevitably lack some of the cogency it would otherwise possess while, in the sphere of professional discipline, the law in effect permits such vital matters to be decided by domestic tribunals without the possibility of any appeal whatsoever '.[3]

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[1] For a list of administrative tribunals, see the Appendix to *Administrative Tribunals at Work*, 1950, edited by Robert S. W. Pollard.

[2] See Lord Justice Denning, *Freedom under the Law*, 1949, p. 95.

Members of the public hope and expect that these various tribunals to whom the duty of deciding disputes is entrusted will arrive at their decisions fairly and honestly. The desirability of some means of ensuring that these just expectations are realised has long been recognised. It is, furthermore, essential that these inferior tribunals should keep within the limits of the jurisdiction allotted to them and should not misinterpret or misapply any questions of law or fact which arise. Some means of ensuring that these requirements also are satisfied is clearly desirable.

It is common knowledge that control over inferior tribunals is provided by the High Court acting mainly through the medium of the orders of prohibition and certiorari.[4] In this paper it is proposed to examine the control which the High Court exercises over inferior tribunals through the medium of these two orders. This necessitates a consideration of two questions: first, what types of tribunal will the High Court control through the issue of prohibition and certiorari and, secondly, upon what grounds will the High Court interfere if it is decided that prohibition or certiorari is applicable to the particular tribunal in question?

THE INFERIOR TRIBUNALS TO WHICH PROHIBITION AND CERTIORARI APPLY

It is familiar law that prohibition and certiorari will only issue where the powers sought to be controlled are judicial or quasi-judicial in nature. Authority for this is provided by the oft-quoted statement of Atkin, L.J., in *The King* v. *The Electricity Commissioners*[5]: ' Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act *judicially,* act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs '. Like most generalisations, this statement is too wide to be strictly accurate[6] but in so far as it indicates that the orders only issue where there is a duty to act judicially in the broad sense of that term, the statement is admitted to be correct.[7] A further familiar illustration of this principle is provided by the case of *The King* v. *The Legislative Committee of the Church Assembly, ex p. Haynes-Smith*,[8] where prohibition and certiorari were applied for to restrain the National Assembly of the Church of England and its legislative committee from proceeding with the Prayer Book Measure, 1928. The application was unsuccessful because it was held that neither the National Assembly nor its legislative committee was empowered to act, or did in fact act, judicially.

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[3] See D. Lloyd, ' The Disciplinary Powers of Professional Bodies ' (1950) 13 *Modern Law Review,* p. 306.

[4] For a general account of the nature and development of the prerogative writs, see S. A. de Smith, ' The Prerogative Writs ' (1949) 11 *Cambridge Law Journal,* pp. 40–56.

[5] [1924] 1 K.B. 171, at p. 205.

[6] See *R.* v. *St. Edmundsbury, etc.* (*Bishop*) [1947] 2 All E.R. 170.

It being universally accepted that prohibition and certiorari will only lie in respect of judicial and quasi-judicial functions it is clearly of fundamental importance to determine the precise meaning of the terms 'judicial' and 'quasi-judicial'. It has long been customary to divide the functions of government into three classes, namely, legislative, executive and judicial. The broad distinction between these functions is accepted to be that the legislative function involves the making of general rules of conduct, the executive or administrative function involves the regulation of public affairs and the conduct of public services, and the judicial function involves the interpretation of law and the settling of disputes. It is well known that this familiar threefold division of the functions of government was popularised by Montesquieu who based his famous theory of the Separation of Powers on the division of the functions of government along these lines.[9] This popular classification of the functions of government has been severely criticised by many writers. As Sir Ivor Jennings has pointed out [10] 'it is not possible to distinguish by analysis "legislative", "executive", and "judicial". Montesquieu made no nice distinctions, and none of his successors has been successful in drawing them'. Similarly, Professor Robson states [11] that 'to attempt to describe the intricate system of government which exists in a modern state in terms of this simple trinity of powers is to run the danger of reducing a complex truth to a simple falsehood '. The difficulty, which so often confronts the court of distinguishing between judicial and administrative functions has led to the creation of a fourth category, namely, the quasi-judicial function; the term quasi-judicial being used to describe the situation where the function has sufficient of the attributes of a judicial function to render it amenable to prohibition and certiorari but does not possess all the characteristics of judicial functions. But here even greater difficulty in definition has been experienced. The Committee on Ministers' Powers made an attempt to distinguish between an administrative function on the one hand and judicial and quasi-judicial functions on the other hand,[12] but critics have shown that the distinctions drawn are too obscure to offer reliable guidance.[13] Thus, it is said that a function is quasi-judicial where the procedure preparatory to the decision resembles that of a court of law but the ultimate decision is reached not by applying the law of the land to the facts but by considerations of public policy. But, as has been so often said, the court is not a legal slot machine and even purely judicial decisions involve an element of discretion. Nevertheless, despite all these criticisms, as Professor Robson indicates,[14] lawyers have ' to decide, in practical cases arising in the courts, whether a particular activity was of a judicial or an administrative (or " ministerial ") character because prohibition and certiorari will lie only in respect of judicial acts and not for those of an administrative or ministerial character ', and therefore the distinctions continue to be drawn by the courts.

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[7] But see W. Friedmann, 'Public Law Problems in Recent English Decisions' (1951) 4 *Current Legal Problems*, pp. 382–383, as to whether the function in this case was properly regarded as quasi-judicial in nature.

[8] [1928] 1 K.B. 141.

[9] *Esprit des Lois*, Book 11, Chap. 6.

[10] *The Law and the Constitution*, 1943, p. 24.

[11] *Justice and Administrative Law*, 1951, p. 4.

The notion underlying the idea of a judicial function is, of course, clear enough. As Professor Robson says,[15] ' It is easy enough to take a typical example of each kind of function, and to identify it as belonging to a particular category '. The difficulty is to extract from these examples some characteristics which will provide a test for distinguishing the functions. Thus, it has never been doubted that prohibition and certiorari will issue to those courts, such as courts-martial,[16] which approximate closely to the regular courts of law but deal only with particular sections of the population. Nor has it ever been questioned that prohibition and certiorari will issue to disciplinary bodies such as the General Medical Council[17] which are set up for particular professions by statutory authority, or whose powers are derived from or controlled by statute,[18] although in the case of other disciplinary bodies which are set up voluntarily, for example, the Jockey Club Stewards, the orders seem to be inapplicable, despite the judicial or quasi-judicial nature of their functions.[19] In addition, of course, prohibition and certiorari will lie against those inferior courts which form part of the long-established system of ordinary courts, although the only case where this ever arises is in the case of magistrates' courts.[20] In the case of all the above bodies it is admitted that the functions are judicial or quasi-judicial rather than legislative or administrative. The difficulties concerning the scope of judicial and quasi-judicial functions arise in connection with those bodies, commonly called administrative tribunals, to which Parliament has entrusted the determination of disputes concerning the many new rights and duties which it has created by statute. The difficulty about this category is that it merges almost imperceptibly into the class of authorities which arrive at purely administrative decisions. Nevertheless, the distinction is drawn by the courts and our task is to ascertain whether any principles can be extracted from the decisions which will enable us to distinguish judicial and quasi-judicial functions from purely administrative functions. Professor Robson in considering the wide question of whether any test can be ascertained for distinguishing judicial from administrative functions for all purposes, points out[21] that 'those decisions disclose no coherent principle, and the reported cases throw no light on the question from the wider point of view from which we are now discussing it save to demonstrate by the very confusion of thought which they present, the difficulty of arriving at a clear basis of distinction '. It is, of course, perfectly true that it is impossible to observe any one rule which will enable us to distinguish judicial or quasi-judicial from administrative functions for all purposes. The cases which Professor Robson cites amply bear that out.[22] It is submitted that the courts have been influenced by the consequences of calling a function judicial or administrative, and those consequences vary from case to case. Thus, as Mr. de Smith has pointed out, when considering the issue of prohibition and certiorari the courts have tended in the past to give the term judicial a wide meaning, whereas when considering the question of judicial immunity they have tended to interpret the term ' judicial ' in a narrow sense.[23]

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[12] Cmd. 4060, 1932, pp. 73 *et seq.*

[13] Jennings, *op. cit.*, Appendix 1; Robson, *op. cit.*, Chap. 6.

[14] Robson, *ibid.*, p. 51.

[15] *Ibid.*, p. 4.

[16] See, for example, *Ex p. Brown* (1892) 37 Sol.Jo. 27. But, as to the issue of certiorari to ecclesiastical courts, see *R.* v. *St. Edmundsbury, etc. (Bishop)* [1947] 2 All E.R. 170.

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[17] The disciplinary powers formerly exercised by the General Medical Council are now exercised by the Medical Disciplinary Committee by virtue of the Medical Act, 1950.

[18] See, for example, *General Medical Council* v. *Spackman* [1943] 2 All E.R. 337. The actual decision in this case must now be read in the light of the Medical Act, 1950, which compels the Medical Disciplinary Committee to accept a finding of the High Court on an issue of adultery.

[19] In these cases control is exercised through the medium of actions for damages, injunctions and actions for declarations. See, for example, *Russell* v. *Duke of Norfolk* [1949] 1 All E.R. 109.

[20] See, for example, *R.* v. *Sussex Justices, ex p. McCarthy* [1924] 1 K.B. 256.

[21] *Op. cit.*, p. 5.

We are here concerned only with the meaning of judicial and quasi-judicial as it affects the issue of prohibition and certiorari, and we can therefore limit ourselves to cases where these questions arise. Furthermore, in considering the meaning of judicial in relation to the issue of prohibition and certiorari we must bear in mind the purposes of these two orders. The grounds upon which the orders will issue are to be considered in more detail later and for the moment it is sufficient to say that the main grounds are excess of jurisdiction and infringement of the principles of natural justice. If anybody exceeds his jurisdiction there are usually other methods of control than prohibition and certiorari and, therefore, the orders are not normally essential for this purpose.[23a] But so far as the other main ground of interference is concerned, namely, infringement of the principles of natural justice, it is essential to hold that the function is judicial or quasi-judicial before the principles can be said to be applicable at all. Therefore, it is submitted that the chief importance of the distinction between judicial and administrative functions lies in the application or non-application of the principles of natural justice. It is proposed, therefore, largely to confine the examination of the meaning of judicial and quasi-judicial in this paper to cases where the purpose of holding the function to be judicial is to hold the principles of natural justice applicable. It is submitted that if one bears this purpose in mind the cases are seen to be based, if not upon logic, at least upon common sense. The principles of natural justice will be considered in more detail later. For the present purpose, it suffices to say that natural justice requires a person exercising a judicial function to reach his decision fairly without bias, giving to the parties a fair hearing. These are the standards which the High Court through the issue of prohibition and certiorari requires every judge to observe. With this notion of natural justice in mind it is proposed to consider now the cases in which the question of whether a function was judicial or administrative has had to be answered by the Court in order to hold these principles applicable or not applicable.

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[22] *Op. cit.*, pp. 5–13.

[23] ' The Limits of Judicial Review: Statutory Discretions and the Doctrine of Ultra Vires ' (1948) 11 *Modern Law Review*, p. 308.

[23a] But see *R.* v. *Manchester Legal Aid Committee, ex parte R. A. Brand & Co., Ltd.* [1952] 1 All E.R. 480, at p. 486, for a case where it was suggested that a body would be free from any control unless certiorari were applicable.

One of the most important cases in which a function was held to be quasi-judicial and the principles of natural justice accordingly to be applicable is *Board of Education* v. *Rice.*[24] In that case the Board of Education had to decide a question regarding discrimination by a local education authority against a non-provided school in the matter of salaries and the enforcement by the Board of their decisions. In the House of Lords, Lord Loreburn used these oft-quoted words '[the Board of Education] must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything '.[25] In this case it will be noted that emphasis was laid on the fact that there were two parties in dispute and the third party, the Board of Education, was in the position of arbitrator who must act in good faith and listen fairly to both sides. Of a similar nature were the facts in the leading case of *Local Government Board* v. *Arlidge,*[26] another House of Lords decision. In that case the Hampstead Borough Council made a closing order in respect of Mr. Arlidge's house on the ground that it was unfit for human habitation. Mr. Arlidge appealed to the Local Government Board in accordance with the procedure prescribed by section 268 of the Public Health Act, 1875. The House of Lords held that the Local Government Board were under a duty to

[24] [1911] A.C. 179.
[25] *Ibid.*, at p. 182.
[26] [1915] A.C. 120.

observe the principles of natural justice. As Lord Haldane said, 'when the duty of deciding an appeal is imposed those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made'.[27] Other cases which illustrate the same triangular situation are the series of cases known as the Housing Act Cases. A typical example of these is *Errington* v. *Minister of Health*.[28] The facts were that the Jarrow Corporation had made a clearance order under the Housing Act, 1930, and submitted it to the Minister of Health, in accordance with the statutory provisions, for confirmation. The property owners objected to the confirmation of the order, and the Minister of Health was then under a statutory obligation to cause a public local inquiry to be held and to consider the inspector's report on the inquiry and on any objections not withdrawn. After the local inquiry had been held officials of the Ministry consulted officials of the Jarrow Corporation and inspected the property in the company of those officials without the property owners being present. The Court of Appeal held that if no objection were made the Minister would be acting in a purely administrative capacity in confirming the clearance order, but where objection was made, the Minister was acting in a quasi-judicial capacity. Thus, in the latter case, he was required to observe the principles of natural justice by allowing each party to present his case and to know and meet the case of the other party. Consultation with one party in the absence of the other was an infringement of these principles. Lord Maugham said[29] 'My conclusion is that although the act of affirming a clearance area order is an administrative act, the consideration which must precede the doing of that act is of the nature of a quasi-judicial consideration, and the Minister is bound to the extent mentioned by the House of Lords in *Board of Education* v. *Rice*'.[30] It follows from this decision that before any objection is lodged, the Minister is acting in a purely administrative capacity and need not therefore comply with the principles of natural justice. Accordingly, in *Frost* v. *Minister of Health*,[31] Swift, J., held that before an objection is lodged the Minister is free to make such inquiries as he thinks fit and to advise the officials of the local authority on the terms of the clearance order.

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[27] [1915] A.C. 120, at p. 132.

[28] [1935] 1 K.B. 249.

[29] *Ibid.*, at p. 273.

[30] [1911] A.C. 179.

[31] [1935] 1 K.B. 286.

With reference to the above and other cases, Professor Robson says 'the words "judicial" and "administrative", when used by the courts, have ceased to have any clear meaning from an analytical standpoint. Their chief significance is in indicating to which particular functions the courts will apply the rules of natural justice and to which they will not apply them '.[32] With that expression of opinion few will disagree. However, although it is impossible to extract from the decisions of the courts any precise definition of judicial and administrative, the decisions do seem to be based on common sense in indicating the need or absence of need for complying with natural justice. In all the cases mentioned above the person required to observe the principles of natural justice was in a position analogous to that of a judge. There were two parties in dispute and he was required to give a decision, although it is true that in giving the decision he was not bound by any rules of law or by the evidence of the parties. In the circumstances it was clearly fitting that the judge should give each party an opportunity of presenting his case and of meeting the case against him and that the judge should not display any bias.

With these cases may be contrasted the more recent case of *Franklin* v. *Minister of Town and Country Planning,*[33] more popularly known as the *Stevenage Case*. In this case the Minister of Town and Country Planning made a draft order under the New Towns Act, 1946, designating a certain area in Stevenage as the site of a new town. Objection to the order was made, and the Minister, in accordance with the requirements of the statute, then held a public inquiry at which the objectors put forward their contentions. After the inquiry the Minister issued a statement disposing of the principal objections and then proceeded to make the order. Before the inquiry had been held, before the New Towns Act had even reached the statute book, the Minister had made a political speech at Stevenage in which he had expressed his intention of making the area the site of a new town and told hecklers that it was no good their jeering because it was going to be done. The objectors applied for certiorari to quash the order on the ground that the Minister by his speech had shown bias and thereby infringed the principles of natural justice. The House of Lords held that the function of the Minister was purely executive and that since no judicial or quasi-judicial duty lay upon him all reference to bias and the principles of natural justice was irrelevant. The object of the public inquiry was simply to inform the Minister's mind and not to consider any issue between the Minister and the objectors. With reference to this case, Professor Wade has written [34] ' It is difficult at first sight to reconcile this decision with the housing cases,[35] but it must be remembered that in the latter the Minister is the confirming authority; in the case of the new towns he is the authority chosen to initiate action and has for that reason been given absolute discretion as to his choice '. Similarly, Professor Robson points out [36] that ' It should have been obvious from a cursory glance at the New Towns Act that the rules of natural justice could not apply to the Minister's action in making an order for the simple reason that the initiative lies wholly with him. His role is not to consider whether an order made by a local authority should be confirmed, nor does he have to determine a controversy between a public authority and private interests. The responsibility of seeing that the intention of Parliament is carried out is placed on him. It is he, and he alone, who must be satisfied that it is expedient in the national interest for a new town to be developed in a particular place by a development corporation appointed under the Act. In such circumstances the Minister cannot be neutral and indifferent . . . ' It is difficult to see how the view of the House of Lords that the principles of natural justice could not apply to the facts of the *Stevenage Case* can be controverted. If the rules of natural justice require the judge to be free from bias and to give both sides an opportunity of presenting their case and meeting the case against them, this clearly cannot apply where the alleged judge is the initiator of the action and he supports one side against the objections made by the only other side. Such a situation cannot be said to approximate to that of a judge.

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[32] Robson, *op. cit.*, p. 494.

[33] [1948] 1 A.C. 87.

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[34] *Constitutional Law*, 1950, p. 295.

[35] See, for example, *Errington* v. *Minister of Health* and *Frost* v. *Minister of Health, supra.*

[36] *Op. cit.*, p. 533.

Provided the Minister did what the statute required him to do, namely, held the inquiry if objections were made, heard the objections, and considered those objections before deciding whether or not to make the order, it is difficult to see how further obligations could be imposed on him by the rules of natural justice. He could not be free from bias since he was the initiator of the action. He could not be bound by natural justice to hear both sides since there was only one side other than his own, and his obligation to hear the other side was imposed by the statute without the aid of the rules of natural justice.

It has been suggested that the rule of natural justice requiring absence of bias is no more applicable to the *Housing Act Cases,* where the function is admittedly quasi-judicial, than to the *Stevenage Case*. The courts, it has been said, would have to recognise that there is necessarily a 'departmental bias' on the part of the Minister of Health which may incline him towards the acceptance of the proposals of the local authority.[37] With regard to this suggestion, it is submitted that, although it may be true that there is necessarily a departmental bias on the Minister's part, nevertheless the rule regarding freedom from bias would apply to the Housing Act cases. For the rules of natural justice do not, as is well known, ensure that justice shall, in fact, be done; they only ensure that there shall be an appearance of justice. Legally the administrator judge is entitled to exercise his discretion in reaching a decision as he thinks fit, and it may well be that he has in fact a bias in favour of one decision rather than another. Nevertheless, it is submitted that the rules of natural justice require him to refrain from openly displaying such a bias if the function is quasi-judicial in nature. Bias would not, it is suggested, be presumed merely by reason of the departmental interest of the Minister, but positive proof of such bias would vitiate a decision if the function were quasi-judicial. It would, no doubt, be generally agreed that if the Minister had a personal, as distinct from departmental, interest in the decision —if, for example, the Minister were the owner in his personal capacity of property to be compulsorily acquired—the decision would be liable to be quashed if the function were quasi-judicial. If that be so, then it would seem difficult to deny that the rule regarding bias is applicable to the Housing Act cases. It is submitted that the only distinction between personal and departmental (or public policy) bias, is that in the former case bias is presumed from the mere fact of having a personal interest, in the latter case bias is not presumed from the mere fact of having a departmental interest.

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[37] de Smith, *loc. cit.,* n. 23 above, p. 317.

It has been shown that there is a considerable body of opinion which supports the House of Lords' decision in the *Stevenage Case* that the functions of the Minister of Town and Country Planning were not quasi-judicial in nature. If one agrees with Professor Robson that the words judicial and administrative when used by the Court have no clear meaning but are simply used to indicate to which functions the courts will apply the rules of natural justice and to which they will not, it seems difficult to controvert the decision. Nevertheless, not all writers are in agreement with the decision. Mr. H. W. R. Wade, in an article in the *Cambridge Law Journal,*[38] has strongly contended that the function of the Minister of Town and Country Planning in the *Stevenage Case* was quasi-judicial. He puts forward the view that 'The rule of the English courts is to presume that "natural justice" is required in the exercise of all statutory powers which depend on the existence of some state of facts, and which affect the rights of individuals, or where (as is now so common) any duty to inquire into facts or hear objections is imposed by Parliament'.[39] On this broad interpretation of the term quasi-judicial, he suggests that the '*Stevenage Case* implies a new attitude, a shift from the common law's natural justice to a more restricted doctrine of statutory interpretation'.[40] The authority cited for this broad definition of quasi-judicial is *Board of Education* v. *Rice,*[41] in which Lord Loreburn, L.C., made the statement, to which reference has already been made,[42] that any one who decides anything must act in good faith and fairly listen to both sides. But, in that case there were two parties disputing and a third party, the Board of Education, was in a position analogous to that of a judge. It is submitted that the *ratio decidendi* must be limited to those facts and Lord Loreburn's generalisation regarded as an *obiter dictum.* Mr. Wade further states that it is difficult to foresee how the *Housing Act Cases* and the *Stevenage Case* will in future stand together, and says that 'Lord Thankerton's remarks do not support such barren distinctions as that he was dealing only with the New Towns Act, or with cases where the Minister is himself one of the parties to the dispute'.[43] The present writer would respectfully agree with Professor Wade and Professor Robson that the *Housing Act Cases* and the *Stevenage Case* are not irreconcilable and that precisely where the distinction does lie is in the fact that the Minister is himself the initiator of the order and therefore patently biased in favour of his own view. Nor, it is suggested, can this distinction be regarded as 'barren'. For reasons already stated, the distinction seems fundamental. As Professor Wade points out 'He (Mr. H. W. R. Wade) does not, however, discuss the difference in the function of the Minister'.[44]

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[38] 'Quasi-Judicial and Its Background' (1948) 10 *Cambridge Law Journal,* pp. 216–240.

[39] *Ibid.,* at p. 233.

[40] *Ibid.,* at pp. 239–240.

[41] [1911] A.C. 179.

[42] *Ante,* p. 111.

The notion that the *Housing Act Cases* can be distinguished from the *Stevenage Case* on the ground that in the former the Minister was a third party settling a dispute between two other parties, whereas in the latter the Minister was the initiator of the order and himself one of the only two parties was, however, again criticised by Mr. Wade in a later article[45] arising out of *Nakkuda Ali* v. *Jayaratne*.[46] The facts of this case were as follows: The appellant was a textile dealer in Ceylon whose licence to trade had been cancelled by the Controller of Textiles under Regulation 62 of the Defence (Control of Textiles) Regulations, 1945, of Ceylon. This regulation provides that 'where the controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer, the controller may cancel the textile licence'. The Judicial Committee of the Privy Council held that the function of the Controller of Textiles was purely executive and that, accordingly, the principles of natural justice were inapplicable and so also the motion of certiorari was an inappropriate proceeding. As to this, Mr. Wade says 'The Privy Council held that the controller of textiles was not "determining a question" but taking executive action. The idea that there must be "a question" before the right to be heard arises is perhaps akin to the concept of the lis, which come into use in the Housing Act cases as a name for the contest between the local housing authority and the objector, which under the Housing Act procedure had to be determined finally by the Minister after a public inquiry '.[47] He states that this idea that it is only where the case is triangular—two parties in dispute and a third party reaching a decision—that an administrative decision is quasi-judicial is counter to the line of nineteenth century cases and to the more recent pronouncements from the Bench of Lord Haldane in *Local Government Board* v. *Arlidge* [48] and Lord Greene in *Johnson & Co.* v. *Minister of Health*.[49] The more recent pronouncements referred to do not in fact appear to challenge the notion of the necessity for a triangular situation; it is submitted that they only point out that there is no necessity for a true lis in the sense of a dispute which must be decided according to the evidence disclosed by the two parties. They emphasise the administrative nature of the ultimate decision which is not limited in any way by the evidence of the parties.

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[43] *Loc. cit.*, p. 240.

[44] *Op. cit.*, p. 296.

[45] 'The Twilight of Natural Justice' (1951) 61 *Law Quarterly Review*, pp. 103–110.

[46] (1950) 66 T.L.R. 214.

However, the nineteenth century cases to which Mr. Wade refers clearly run counter to any notion that the question of quasi-judicial or administrative can be answered simply by asking ' is the situation triangular or not? ' Thus, in *Cooper* v. *Wandsworth Board of Works*,[50] the Board of Works were empowered by statute [51] to pull down a house where the builder had neglected to give notice of his intention to build seven days before proceeding to dig or lay the foundation. The Court held that the function was judicial to the extent that the principles of natural justice applied and that, accordingly, the Board of Works had to give the builder an opportunity of defending himself before pulling down the house. So also in the case of *Hopkins* v. *Smethwick Board of Health*,[52] there was not a triangular situation and yet the function was held to be quasi-judicial. In the *Hopkins Case* the local Board of Health had statutory power to pull down buildings erected in contravention of local by-laws. The builder had knowingly erected a building in contravention of such local by-laws. The Court of Appeal

[47] *Loc. cit.*, n. 45 above, pp. 109–110.
[48] [1915] A.C. 120, at p. 134.
[49] [1947] 2 All E.R. 395, at p. 399.
[50] (1863) 14 C.B. (N.S.) 180.
[51] Metropolis Local Management Act, 1855, s. 76.
[52] (1890) 24 Q.B.D. 712.

held that the Board of Health must give the builder an opportunity of being heard before pulling down his building. Mr. Wade further cites the case of *Smith* v. *R.*,[53] where statute conferred upon the Governor of Queensland a power to forfeit leases granted by the Commissioner of Crown Lands in Queensland if it were proved to the satisfaction of the Commissioner that the lessee had abandoned the land in question. The Judicial Committee of the Privy Council held that the function of the Commissioner was quasi-judicial.

The above-mentioned nineteenth century cases clearly show that a function can be regarded as judicial in nature even though the administrator judge is a party to the dispute. They do not, however, to my mind, prejudice the theory that the *Stevenage Case* can be distinguished from the *Housing Act Cases* on the ground that in the former case the Minister was the initiator of the order and one of the parties, whereas in the latter cases he was not. They only indicate that a function can be regarded as judicial in nature in the two party case in certain circumstances. It must again be emphasised that the terms judicial and administrative have no invariable precise meaning. It is generally admitted that all attempts to define the nature of a judicial power and the nature of an administrative power have failed. The terms judicial and administrative are mainly used to indicate that the principles of natural justice must be or need not be followed. The question is, generally, simply whether the function of the administrator is so analogous to a judicial function that it seems just and proper to say that the administrator ought not to display bias and ought to give the parties or party an opportunity of being heard.

This analogy to a judicial function, it is submitted, may arise in two ways. It may be that the procedure preparatory to the decision is analogous to the procedure of a court, although the function of the administrator is not the type of function conferred upon the judges. On the other hand, it may be that the procedure laid down by the statute does not correspond to the procedure in disputes before the courts, but the function of the administrator is analogous to functions conferred upon judges. Thus, in the *Housing Act Cases,* the making of clearance orders is not regarded as a judicial function, but since there is in those cases something analogous to a lis, a quasi-lis as Lord Greene [54] called it, the courts require the administrator to follow the fundamental principles of justice by not displaying bias and by allowing the parties to present their cases and meet the case made against them. It is submitted that the rules of natural justice will always be required to be followed in the triangular situation. On this footing, the *Housing Act Cases* can be distinguished from the *Stevenage Case*. On the other hand, it may be that nothing analogous to a lis arises out of the statutory power, but the function conferred upon the administrator is regarded as analogous to functions conferred upon the judges. Thus, if, for example, the function involves the condemnation of an offence and the punishment of it by fine or confiscation of property, then although the Minister is himself the accuser, the initiator of the proceedings, the Court may say that the principles of natural justice must be followed. In this way, it is submitted, the decisions in *Hopkins* v. *Smethwick Board of Health* and *Cooper* v. *Wandsworth Boards of Works* can be distinguished from the *Stevenage Case*. Thus, if a Minister were given a statutory power to charge people with the offence of murder and to decide the case himself, then, although the procedure is not analogous to judicial proceedings where the judge is an impartial arbitrator, there seems little doubt that the courts would require the principles of natural justice to be followed.

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[53] (1878) 3 App.Cas. 624.

Some support for this view is provided by the recent case of *R.* v. *Manchester Legal Aid Committee, ex parte R.A. Brand & Co. Ltd.*[54a] In this case it was held that a Legal Aid Committee was exercising a judicial function in determining whether or not to grant a civil aid certificate to an applicant. Parker, J., in delivering the judgment of the Court, pointed out that where 'an administrative body in arriving at its decision at no stage has before it any form of lis and throughout has to consider the question from the point of view of policy and expediency, it cannot be said that it is under a duty at any stage to act judicially' [54b]; see *Franklin* v. *Minister of Town and Country Planning, supra*. Where, on the other hand, an administrative body has before it some form of lis, it is, at that stage, under a duty to act judicially, even though its decision may be based entirely on policy and expediency; and, in the same way, where an administrative body is unconcerned with policy and has to reach its decision entirely on the facts and on the evidence, it is again exercising a judicial function, even though there is at no stage any form of lis before it. In this case it should be noted that the Court were not deciding on the applicability of natural justice, but on the question of whether the Legal Aid Committee had exceeded its jurisdiction and, as no other remedy was apparently available, the Court may have been more ready to hold the function to be judicial.

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[54] [1947] 2 All E.R. 395, at p. 399.
[54a] [1952] 1 All E.R. 480.
[54b] *Ibid.*, at p. 490.

To sum up, my conclusion is that where the case is triangular involving two parties and a third person as judge between them, the courts will always regard the function as quasi-judicial in nature. Where, however, the statutory power does not involve a triangular situation analogous to that before a court of law, whether the function is regarded as judicial or not depends upon the Court's view of the nature of the function. If they regard it as analogous to functions conferred upon the courts, involving, for example, the condemnation of an offence and the punishment of the offender, then they will hold it to be judicial in nature. It may well be, of course, that in the latter case, changing times mean that the courts are now less ready to regard a function as analogous to a judicial function. But, in my submission the cases of *Hopkins* v. *Smethwick Board of Health* and *Cooper* v. *Wandsworth Board of Works* can be reconciled with the more recent cases of *Nakkuda Ali* v. *Jayaratne* without implying any such shifting in attitude. In the former cases the administrators were required to hold that a specific offence had been committed, contravention of the local by-laws in the one case and failure to give the required notice in the other, and to punish for these offences by ordering the pulling down of the offenders' property. Their decisions had to be reached in accordance with the facts and evidence, and left no room for intervention on the grounds of policy or expediency. In *Nakkuda Ali* v. *Jayaratne* the administrator was not condemning the applicant of an offence, he was simply withdrawing a privilege conferred because he believed, and believed on reasonable grounds, that the holder was unfit to enjoy it. Reconciliation with the case of *Smith* v. *R*. is more difficult, but even there one may say that although there was nothing in the nature of condemnation of an offence in *Smith's Case*, property was being forfeited, on a specific ground, namely, abandonment of the property, whereas in *Nakkuda Ali* v. *Jayaratne* a privilege conferred by the executive was being withdrawn. This, of course, would make the decision depend upon whether the statute gave power to take away property in particular cases or simply took away all property and conferred power to hand it back on licence in particular cases. However, despite these attempted reconciliations, it is probably safe to say that the judges are now less ready, in view of the ever-widening field of activity of the executive, to interfere in two party cases by regarding a function as analogous to a judicial function.

However, although in my opinion *Nakkuda Ali* v. *Jayaratne* may possibly be distinguished from *Cooper* v. *Wandsworth Board of Works* and *Hopkins* v. *Smethwick Board of Health*, I would agree that much good and little, if any, inconvenience would result from the adoption of the rule which Mr. Wade suggests is the correct rule to be derived from the latter cases. It should clearly be a rule of good administration to hear the other side of the case when exercising statutory powers which depend on the existence of some state of facts, and which affect the rights of individuals. For this reason one may sympathise with Mr. Wade's view that *Nakkuda Ali* v. *Jayaratne* is a decision which prejudices the rights of individuals without conferring any particular advantage upon the administration.

THE GROUNDS ON WHICH PROHIBITION AND CERTIORARI WILL ISSUE

Assuming that prohibition and certiorari are applicable to the particular function in question, the question then arises as to the grounds on which these two orders will issue. It has long been established that the orders will issue on the grounds of excess of jurisdiction or infringement of the principles of natural justice. In addition, the recent case of *R.* v. *Northumberland Compensation Appeal Tribunals, ex p. Shaw*[55] confirms a point which has long been overlooked, namely, that if the order of the inferior tribunal is a 'speaking order', that is, discloses the grounds of the decision, certiorari will lie to quash the decision on a point of law.

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[55] [1952] 1 All E.R. 122.

The first ground for the issue of prohibition and certiorari requires no discussion. It is clear that the orders will issue if an inferior tribunal exceeds its jurisdiction and instances of this abound in the Reports. Illustrations are provided by the many Housing Act cases, for example, *R.* v. *Minister of Health, ex p. Davis* [56] with regard to prohibition, and *R.* v. *Minister of Health, ex p. Yaffe* [57] with respect to certiorari.

However, a more frequent cause for interference with inferior tribunals, and one which requires more discussion, is an infringement of the principles of natural justice. The question which requires answering is: "What are these rules?" The purpose of the rules is clear enough: it is simply to ensure that there shall be a fair hearing. The courts recognise that this purpose may be achieved without necessarily requiring a tribunal to follow the procedure of a court of law; *Local Government Board* v. *Arlidge*.[58] And it seems clear enough that what is necessary for a fair and full hearing will vary according to the type of case and other circumstances. As Lord Atkin pointed out in *General Medical Council* v. *Spackman*,[59] 'the procedure which may be very just in deciding whether to close a school or an insanitary house is not necessarily right in deciding a charge of infamous conduct against a professional man. So also Tucker, L.J., said in *Russell* v. *Duke of Norfolk* [60]: 'There are . . . no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case'.

[56] [1929] 1 K.B. 619.

[57] [1930] 2 K.B. 98; [1931] A.C. 494.

[58] [1915] A.C. 120.

[59] [1943] 2 All E.R. 337, at p. 341.

[60] [1949] 1 All E.R. 109. In this case the remedy applied for was not, of course, prohibition or certiorari, but damages and a declaration; see footnote 19 and text, above.

This view has been criticised on the ground that it means, if it is correct, that the rules of natural justice are so vague and indefinite as to be devoid of any practical effect.[61] It is submitted, however, that the view is correct, and necessarily correct, and furthermore need not be regarded as harmful. The rules of natural justice are clear enough; they require a fair hearing but no universal requirements for securing this can be safely laid down.

Nevertheless, attempts have been made from time to time to define the rules of natural justice with precision. Thus it is sometimes said that the first requirement is that the parties concerned should have notice of the hearing and of the question to be decided. On this point the facts of *Russell* v. *Duke of Norfolk* indicate that there may be a fair hearing in certain circumstances without abiding by this principle. Thus, in the latter case the complainant had been required by the Jockey Club Stewards to attend an inquiry at which analysts' reports on sweat and saliva taken from a horse trained by the complainant were to be investigated. Mr. Russell had been given notice of this inquiry, but he complained that one of the principles of natural justice had been infringed in that he was not notified of the precise charge to be made against him.[62] But, as Tucker, L.J., pointed out,[63] he (Mr. Russell) knew that the inquiry to be held concerned the possibility of the horse having been doped, and the precise nature of the charge could not, in the circumstances, be communicated until his evidence had been given. Thus, if Mr. Russell's evidence pointed to his absence from the horse's presence, the charge would be negligently allowing the horse to be doped; if, on the other hand, Mr. Russell's evidence pointed to his having been with the horse at all material times, the charge would be that he himself doped the horse. It would seem difficult to maintain that the non-notification of the precise charge made the hearing unfair.

It is said that a second requirement of natural justice is that a party should know the case made against him. The facts of *Russell* v. *Duke of Norfolk* again indicate that there may be a fair hearing without complying with this suggested rule. As has been pointed out, the Jockey Club Stewards in *Russell's Case* did not notify, and could not be reasonably expected to notify, the trainer of the case made against him because they themselves did not know what it would be until they had heard his evidence.

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[61] See Robson, *op. cit.*, pp. 331–332.

[62] In addition Mr. Russell made other complaints, not material for the present discussion, regarding the proceedings before the Jockey Club Stewards.

[63] [1949] 1 All E.R. 109, at p. 117.

A third suggested principle of natural justice is that the judge should be free from bias and from any suspicion of bias. Here again, it is suggested, the nature of the rule varies according to the type of tribunal and other circumstances of the case. The rule is applied strictly to the regular courts of law; *Dimes* v. *Grand Junction Canal Co.*[64]; *R.* v. *Sussex Justices, ex p. McCarthy.*[65] In such cases, any suspicion of bias is sufficient to invalidate the decision. But, it has already been pointed out that in the case of quasi-judicial powers exercised by an administrator, the mere fact of departmental bias cannot, if not voiced, be sufficient to invalidate the decision.[66] It has even been suggested that departmental bias is irrelevant in such cases even if voiced.[67]

It is suggested that natural justice means only that there should be a fair hearing and that the only precise rule that can be laid down without doubt or qualification as a requirement for a fair hearing is that a party should be allowed to present his case. Even in the case of this rule, the mode of presentation which the tribunal is required to allow will vary from case to case. Thus, the regular courts of law are required to follow the rules of evidence and the legal procedure of a court of law, *Lawrence* v. *R.*[68] Other tribunals are not bound by the rules of evidence and procedure of the regular courts of law; *Local Government Board* v. *Arlidge*[69]; *General Medical Council* v. *Spackman.*[70] Again the General Medical Council when hearing a charge against a doctor has been held bound to hear oral evidence from witnesses; *General Medical Council* v. *Spackman.* A Government Department, on the other hand, has been held to satisfy the requirements of natural justice by receiving written representations; *Local Government Board* v. *Arlidge.*

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[64] (1852) 3 H.L.Cas. 794.
[65] [1924] 1 K.B. 256.
[66] *Ante,* p. 115.
[67] See footnote 37, above.
[68] [1933] A.C. 699.
[69] [1915] A.C. 120.
[70] [1943] A.C. 627.

Having considered the infringement of natural justice as a ground upon which the High Court will interfere with inferior tribunals, it remains shortly to consider the third ground of interference which has been mentioned, namely, error on a point of law.[71] It has been pointed out already that this ground is limited to cases where the grounds of decision are set out on the face of the record which is sent up to the Court for review.[72] For this reason, the possibility of High Court interference on this ground is severely limited.[73] It is respectfully submitted that few tribunals will now be found willing to disclose their reasons for their decisions on the face of the record, despite Lord Goddard's optimistic statement[74] that, no doubt, inferior tribunals would welcome the possibility of obtaining High Court guidance on points of law, by means of the order of certiorari.

PROPOSALS FOR REFORM

It is apparent that the present position regarding control of inferior tribunals is far from satisfactory.[75] As Lord Justice Denning has pointed out[76]: 'Our procedure for securing our personal freedom is efficient, but our procedure for preventing the abuse of power is not. Just as the pick and the shovel are no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in this new age'. The scope of prohibition and certiorari is too limited to ensure justice for the individual. Most writers agree that what is now needed is provision for an appeal from these inferior tribunals on questions both of law and, in proper cases, fact, to some independent tribunal.[77] In the case of some tribunals an appeal on questions of law has already been provided.[78] In other cases appeals on questions of both law and fact are allowed.[79] But there are still many cases where no possibility of appeal exists at all except through the limited means of certiorari. Although, it is generally agreed that some form of appeal ought to be universally provided, there is a difference of opinion on the question of whether the appeal should lie from administrative tribunals to a Supreme Court of Administration or to a branch of the High Court.[80] Lord Justice Denning takes the view that the superior court of appeal, which he recommends, should be a part of the Supreme Court of Judicature. 'It would then be apparent to all', he writes, 'that the new tribunals administer the law just as much as the other courts of the land'.[81] With this opinion the present writer would respectfully agree, with the added submission that this suggested tribunal should deal not only with appeals from the administrative tribunals but with appeals from disciplinary bodies and other inferior tribunals as well. The scope of this paper and therefore the scope of the suggested provision for an appeal is limited to cases where the inferior tribunal is exercising a judicial or quasi-judicial function in the sense above considered, that is to say, is adjudicating upon a dispute or deciding an issue on the facts and evidence before it. This will, of course, require careful definition of the cases in which an appeal is to be granted. Whether further control over the exercise of administrative functions affecting private rights is also desirable is a matter which has received much consideration in recent years, and it may well be that provision for an appeal within certain limits is also required in these cases.[82]

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[71] On this point, see generally de Smith, 'Certiorari and Speaking Orders' (1951) 14 *Modern Law Review*, pp. 207–210.

[72] It has no application to magistrates' courts; see *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1952] 1 All E.R. 122.

[73] See C. M. Schmitthoff, 'The Growing Ambit of the Common Law' (1951) 29 *Canadian Bar Review*, p. 469, at p. 477, where it optimistically stated that this decision 'probably is the most important recent decision on the supervisory jurisdiction of the courts'.

[74] [1951] 1 K.B. 711, at p. 724.

[75] See Schmitthoff, *loc. cit.*, pp. 469–482, where the opposite view is put forward.

[76] *Freedom under the Law*, 1949, p. 126.

[77] See, for example, Robson, *op. cit.*, pp. 540–545 and 618 *et seq.*; R. C. FitzGerald, 'Safeguards in the Exercise of Functions by Administrative Bodies' (1950) 28 *Canadian Bar Review*, pp. 538–563; Sieghart, *Government by Decree*, 1950.

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[78] For example, an appeal lies from the Pensions Appeal Tribunal to a single judge of the High Court; Pensions Appeal Tribunals Act, 1943.

[79] For example, the Medical Act, 1950, provides for an appeal both on law and fact from the Medical Disciplinary Committee to the Privy Council; and the Courts Martial (Appeals) Act, 1951, provides for an appeal on law and fact from courts martial to a Courts Martial Appeal Court.

[80] See, for example, Robson, *op. cit.*, and FitzGerald, *loc. cit.*, who express a preference for a Supreme Court of Administration separated from the existing Supreme Court of Judicature.

[81] *Op. cit.*, p. 96.

[82] See FitzGerald, *loc. cit.*, pp. 538–563.

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THE LAW OF ABORTION

Glanville Williams

My object is to state the present legal position of induced abortion, with particular reference to the unreported case of *R.* v. *Bergmann and Ferguson,*[1] and to consider the arguments for legislative change.

ABORTION AND CHILD DESTRUCTION

There is an unfortunate ambiguity in the term 'abortion'. In law, abortion (that is, induced abortion) means any untimely delivery voluntarily procured with intent to destroy the fœtus. It may be committed at any time before the natural birth of the child. A synonym, and the term used in the governing statute, is 'miscarriage'. In medical and statistical usage, however, abortion means untimely delivery before the child is viable, that is to say, capable of being reared if born at the time of the act of abortion.[2] A child is regarded as viable from the beginning of the twenty-eighth week of pregnancy, *i.e.,* near the end of the seventh lunar month, though it was forecast in 1937 that with improved methods an infant could be reared independently of the mother from the twenty-sixth week. Those who advocate the extension of legalised abortion generally use the term in its medical sense. The changes that they propose would not, therefore, apply to operations performed after the fœtus is viable.

At present the law regards any interference with pregnancy, however early it may take place, as criminal, unless for therapeutic reasons. The fœtus is a human life to be protected from the moment when the ovum is fertilised. It is not generally realised that this attitude is not older than the beginning of the last century. Before 1803 the legal prohibition of induced abortion was confined to the period after the fœtus had quickened, that is, moved in the womb, which usually takes place about the sixteenth week. This rule goes back to a former theological doctrine relating to the nascence of the soul: the soul was supposed to enter the body of the unborn child at the moment of quickening.[3] Influenced by this doctrine, Bracton asserted that the killing of the fœtus after quickening was murder[4]; Coke, however, denied this, and asserted such a killing to be a misdemeanour ('great misprision') only.[5] Abortion before quickening was no crime. So the law remained (though hardly, if at all, enforced) until 1803, when it was put on a statutory footing: abortion before quickening became a crime, but not punishable so severely as abortion after quickening; both were felonies.[6] The crime now rests on the Offences against the Person Act, 1861, s. 58, which establishes a uniform maximum punishment of imprisonment for life whether the abortion is attempted before or after quickening. The Act covers two cases: (1) where a pregnant woman uses any means with intent to procure her own miscarriage, and (2) where any one else unlawfully uses means with such intent whether the woman is pregnant or not. Instances of means given in the statute are 'poison or other noxious thing' and 'any instrument'.[7] It will be seen that the crime consists not in the procuring of miscarriage but in the attempt to do so. It is immaterial that the attempt is unsuccessful or even that (where someone other than the woman herself is charged) the woman is not with child. The maximum penalty is remarkably severe for a mere attempt. In contrast the maximum for attempted rape, which most people would think a much worse crime, is only seven years' imprisonment.

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[1] Central Criminal Court, May, 1948. The quotations later in this article are from the official transcript of Morris, J.'s direction to the jury.

[2] See Report of the Departmental Committee on Maternal Mortality, Cmd. 5422, 1937, p. 194; F. J. Taussig, *Abortion,* 1936, p. 21. Untimely delivery after the child is viable is medically referred to as premature labour. 'Miscarriage' is also used medically and popularly in a sense different from its legal one, namely, the premature expulsion of the contents of the uterus spontaneously, or as the result of an accident. Yet even medical usage is not fixed; for opposing definitions, see Sydney Smith, *Forensic Medicine,* 1949, p. 324; L. A. Parry, *Criminal Abortion,* 1932, p. 1.

Criminal abortion (miscarriage) implies that the fœtus is killed; the normal obstetrical procedure of inducing labour is not criminal. Parry, *op. cit.,* is in error as to this.

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[3] D. R. Seaborne Davis, 'The Law of Abortion and Necessity' (1938) 2 *Modern Law Review,* at p. 131, quoting Westermarck, *The Origin and Development of the Moral Ideas,* 1912, Vol. 1, p. 413, who in turn quotes St. Augustine, Canon Law and Justinian.

[4] Folio 120b.

[5] 3 Co.Inst. 50; Davies, *op. cit.,* at pp. 133–134; Report of Interdepartmental Committee on Abortion, 1939, p. 27. Davies, *op. cit.,* at p. 133 and in his earlier article 'Child-Killing in English Law' (1937) 1 *ibid.,* at pp. 211–212, quotes Willes, J., to the effect that the offence of misprision was obsolete. It is not clear whether Willes, J., was referring to the specific offence or to misprisions in general; if the latter, he may have misunderstood the meaning of misprision, which formerly meant a high misdemeanour; it cannot be said that the law of misprision in general is obsolete merely because some offences of misprision are.

[6] Davies, *op. cit.,* 1938, at p. 134.

[7] Owing to a restrictive judicial interpretation, it may be that drugs and instruments are the *only* 'means' hit by the statute.

The crime of abortion is supplemented by the crime of child destruction which was created by the Infant Life (Preservation) Act, 1929. The object of this statute was to fill a gap in the legal protection of the child as it was emerging into the world. To kill a child when partially extruded from its mother is not murder; also, it is probably not abortion. The Act makes it a felony punishable with imprisonment for life. The crime is committed by ' any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother '. This definition seems to make child destruction overlap abortion, the differences being that abortion covers the whole period of gestation, child destruction only the latter part, when the fœtus is viable [8]; while on the other hand, child destruction is possible after birth has started, an event that makes abortion inapplicable.

WHEN ABORTION IS LEGAL

A proviso to the child destruction statute adds that no person is to be found guilty unless it is proved that the act was not done in good faith for the purpose only of preserving the life of the mother. It is an example of our haphazard methods of law reform that although this proviso was seen to be necessary in 1929, no exception to the same effect was inserted by amendment in the abortion statute of 1861, though the two crimes overlap. On the law as it stood in 1929 it might have been thought that a prosecution would lie under the abortion statute for the very thing that was exempted from liability if prosecuted under the child destruction statute. Such a result would be topsy-turvy, because child destruction, which is committed in respect of a viable fœtus, is much more serious than an abortion in the early months of pregnancy. The draftsman of the abortion statute had, however, taken the precaution to insert in it the blessed word 'unlawfully' ('whosoever shall unlawfully . . .'), which was commonly taken to imply that some abortions were lawful. This view was upheld by Macnaghten, J., in *R.* v. *Bourne*,[9] the effect of which decision is to read into the abortion statute the same exception as that in the child destruction statute, and to interpret 'preserving the life of the mother' in an extended sense to include preserving the longevity of the mother. The decision confirms an opinion long held in the medical world.

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[8] ' Capable of being born alive ' in the Act clearly means capable of being born alive if delivered at the time when the act was done. The Act provides that evidence that a woman was pregnant for 28 weeks shall be prima facie evidence that she was pregnant of a child capable of being born alive.

Macnaghten, J.'s direction is also a striking vindication of the legal view that the defence of necessity applies not only to common law but even to statutory crimes. It is true that the direction proceeded in some slight degree on the analogy of the child destruction statute, which contains an express exemption for the preservation of the life of the mother; but the exception in the one statute was not in itself a ground for reading a similar exception into another. The only legal principle on which the exception could be based was the defence of necessity. It is true, also, that Macnaghten, J., proceeded in part on the ground that the abortion statute contained the word 'unlawfully', which he regarded as implying that some abortions are lawful. The word does not, however, specify which abortions are lawful, and again the only principle indicating the extent of legality is the defence of necessity. The defence of necessity involves a choice of values and a choice of evils, and the choice made by the judge appears clearly from his statement that 'the unborn child in the womb must not be destroyed unless the destruction of that child is for the purpose of preserving the yet more precious life of the mother'.[10] Apparently the interest of the mother in living a single extra day is preferred to the life of the child. This may sound like pushing the argument to an extreme, but it is submitted that legal certainty requires the rule to be an absolute one. In practice these matters cannot be estimated to periods of days.

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[9] [1939] 1 K.B. 687. The case is also reported in [1938] 3 All E.R. 615, but the variations between the two reports, in omissions and additions, are so great that Macnaghten, J., must have almost rewritten his judgment for the Law Reports version.

[10] From the report in [1938] 3 All E.R., at p. 620. Almost the whole of this page of the All England Report is omitted from the Law Reports version.

The result of the decision is, as Macnaghten, J., himself pointed out, that if a doctor unreasonably refuses to perform the operation when it is necessary to save the life of the mother, and if in consequence the mother dies, the doctor can be convicted of manslaughter. (This is a serious rule for the Roman Catholic practitioner, whose religion apparently forbids him to perform the operation in any circumstances.) Another result that has since followed is that the operation of abortion can be performed under the National Health Service.

Four questions arise as to the scope of the exception based upon the doctrine of necessity.

(1) Is it limited to cases where the operation is performed for the purpose of preventing the mother from having her days cut short? So far as *Bourne* itself goes, there is no hint that the exception is any wider than this. Not only did Macnaghten, J.'s direction confine itself to this case, but his reasoning proceeded in part on the analogy of the child destruction statute, where the exception is limited to the preservation of the mother's life. It is true that at one place the learned judge directed the jury to find whether the accused believed that the continuance of the pregnancy would make the patient a physical or mental wreck [11]; but this must be read in the light of his earlier intimation that the case was one in which health was depressed so much that life was shortened,[12] and his concluding direction which was confined to the preservation of the girl's life.

Looking at the question on principle, there seems to be no good reason why the defence should not be extended to cases where pregnancy is terminated for the purpose of preventing serious physical injury to the mother, even though that injury is not of such a character as to affect the duration of life (for example, impairment of sight or hearing). This is the general medical view.[13] The reason is that the mother's life must be considered in relation to its quality as well as to its duration. Serious physical injury to the mother, who is a human being with the full human capacity for pain, is an evil greater both morally and socially than the destruction of the fœtus, at any rate if the fœtus is in an early stage of development. It is true that the offence of abortion does not discriminate between an operation performed in the earlier and later stages of pregnancy; but an operation performed in the later stages falls within the law of child destruction, which contains no defence in respect of the health (as opposed to the life or longevity) of the mother.[14] It may seem reasonable that there should be greater freedom of interfering with pregnancy in the earlier stages than very late.[15]

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[11] [1939] 1 K.B., at p. 694.
[12] At pp. 692–693.
[13] Parry, *op. cit.*, pp. 11–12.

The view that all therapeutic abortions are lawful is slightly supported by the later case of *Bergmann and Ferguson* (1948),[16] which seems to indicate that where serious injury to health is feared, the Court will not look too narrowly into the question of danger to life.

It is the practice of some obstetricians to induce abortion where the mother threatens that otherwise she will commit suicide. Whether such a threat would in itself be sufficient to legalise the operation is open to grave doubt.

So far there has been no indication in the cases that abortion would be legally justified on the ethical ground that the mother was raped or the intercourse obtained by threat or fraud, or on the eugenic ground that the father or mother is feeble-minded or affected with a transmissible disease, or that the intercourse was incestuous; still less on the economic ground that the parents could not well support another child. It seems unlikely that the judges will ever feel themselves able to stretch the doctrine of necessity to cover any of these considerations. They may all, however, enter indirectly by giving rise to the doctor's belief that it would be injurious to the mother to allow her to give birth to the child. The latter consideration probably validates the practice of inducing abortion where the mother contracts German measles within the first three months of pregnancy, because there is then a strong probability that the child will be born deformed. It could probably be established that the birth of such a child would be dangerous to the mother.

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[14] Presumably the express exception in the child destruction statute would prevent the courts reading in other exceptions under the doctrine of necessity. It may be thought that this is a point that the legislature should reconsider.

[15] For a supporting argument, see Roland Burrows, K.C., in (1938) 86 L.J.Newsp. 155, 170.

[16] Note 1 above.

(2) The second question is this. When necessity is a defence, must it be shown that the act was objectively necessary (that is, necessary in the view of the jury), or is the surgeon's belief in necessity a defence? It is submitted that the second is the correct view. The surgeon's belief that the operation is necessary to prevent injury to the mother excludes a guilty mind, *mens rea,* on his part, whether it was reasonable or not.

This view of the law appears to be supported by the direction in *Bourne,* where the learned judge laid it down that a defence to the charge of abortion arises where the act was 'done *in good faith* for the purpose only of preserving the life of the mother'.[17] It is true that later in his direction he slipped in the words 'on reasonable grounds',[18] but still later he reverted to the simple statement of 'honest belief'.[19] The point was made clearer in *Bergmann and Ferguson,* where Morris, J., addressed the jury in the following terms:

> 'You are not concerned with the question as to whether Dr. Ferguson arrived at the right conclusion; you have not to decide whether Dr. Ferguson did or did not make a mistake. Between medical people there may often be differences of opinion; sometimes it is difficult to assert which of two opinions is to be preferred; but you are not here to weigh up whether Dr. Ferguson was correct or incorrect in the view she had formed. You have to be satisfied by the prosecution that she expressed a dishonest opinion, and that when she advised, if you think she did advise, the termination of pregnancy by her letters in these two cases, you will have to consider whether you are persuaded by the evidence called by the prosecution that that lady gave a dishonest opinion, did not act in good faith, and was therefore advising something that was unlawful'.

If this is so, some remarks of Macnaghten, J., in *Bourne* seem to need qualification. The learned judge said that the defence of necessity 'could not be available to the professional abortionist', and 'members of the medical profession alone could properly perform such an operation'.[20] This restriction is intelligible if reasonable belief is required, but not if the question is merely one of belief. A quack may in fact believe that he is saving the woman's life. However, a jury would be slow to credit him. The question is really one of evidence as to belief, not of drawing a rigid legal line between qualified and non-qualified practitioners.

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[17] [1939] 1 K.B., at p. 691.

[18] At p. 694.

[19] At p. 694, l. 6; cf. [1938] 3 All E.R., at p. 620 E–F. It should be noted that the adjective 'honest' as applied to belief is superfluous. Either there is or there is not belief; there is no such thing as a dishonest belief. So also with 'bona fide belief'.

[20] [1938] 3 All E.R., at pp. 617 D–E, 621 D; [1939] 1 K.B., at p. 695.

As a matter of law reform it is highly desirable to prevent unqualified persons from performing the operation, even on therapeutic grounds. This is one reason why the law of abortion should receive attention from Parliament.

Although the opinion of the practitioner is legally conclusive, this does not mean that the practitioner does not have to justify his opinion in Court. In practice he has to, for otherwise the jury may not believe him when he swears as to his belief. This is so although (as *Bourne* decides) the burden rests on the prosecution to prove that he did not have the requisite belief. The practitioner's failure to adduce evidence in support of his belief might well be taken as corroboration of the prosecution's case that he did not have it.

(3) The third question is whether the necessity must always be known to the actor, or whether one can (so to speak) act by accident from necessity. D performs the operation of abortion. He does it in order to earn his fee, and makes no inquiry whether it is necessary to preserve the life of the mother. In fact, however, he performs the operation competently, and it is proved that the operation did save the mother's life, owing to cardiac weakness of which D was unaware. Can D defend himself on this ground? It is submitted that he can, for although he has the *mens rea* of the offence, he has not committed the forbidden act, the *actus reus*.

This suggests another qualification upon the rule as it was formulated in *Bourne*. Macnaghten, J., not only limited the rule to members of the medical profession, but confined his direction to the jury to the question of Mr. Bourne's belief in necessity. This was justifiable on the facts of the case because that was the only relevant issue. A full statement of the law should, however, leave it to the jury to find whether the operation (whether or not thought to save the mother's life) did in fact do so.

(4) Mr. Bourne operated without fee, and thus acted solely in the duty of his profession. Dr. Bergmann charged a fee, and

her motive was therefore tinctured by a desire to earn her own living. This fact made no difference. Self-interest is not inconsistent with necessity.

The decision in *Bourne* has ameliorated the law but has not yet taken full practical effect. The medical practitioner is said to be still chary to act, except in the clearest cases, partly because he fears that public opinion may not be in favour and partly because he is not certain how far the *Bourne* decision protects him.[21] In this respect it is unfortunate that the ruling in *Bergmann and Ferguson* was not reported, for it sets at rest some doubts left by *Bourne*. However, the mere fact that a prosecution is unlikely to be successful may not be enough to reassure the ordinary doctor. No one wants the publicity of an assize court, and even an unsuccessful prosecution may be professionally ruinous.

The course recommended to the doctor in a manual of forensic medicine is to protect himself by consultation, if possible with an obstetrician or gynæcologist, otherwise with a senior practitioner of standing.[22] Sometimes the advice of two other medical practitioners is sought. There is no other therapeutic operation in which the unanimous opinion of three doctors in favour of the operation is considered to be necessary before it can be performed, still less one in which all three doctors act under the threat of punishment and loss of livelihood if their conduct is afterwards misinterpreted by a jury.

Sydney Smith's *Forensic Medicine* advises the doctor in addition to obtain the express permission of the husband or guardian.[23] There is no legal warrant for this advice, and it seems to be unsound. If a doctor failed to perform a necessary operation because of the husband's refusal to consent, where the woman desired the operation, the doctor would probably be liable for negligence, and if the woman died he might be guilty of manslaughter. A doctor should, of course, inform the husband and listen to his comments; but the decision upon the necessity of the operation must be the doctor's, not the husband's. Nor can there be any point in asking for the husband's permission if it is intended to proceed whether the permission is given or not.

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[21] See Dr. Eustace Chesser, 'The Law of Abortion' (1950) 72 *Medical World*, p. 495. There are some practitioners who perform criminal abortions secretly, or under the pretence of therapy, but their fees put them beyond the reach of the working classes. See Dorothy Thurtle, *Abortion: Right or Wrong?* 1940, pp. 18ff. Dr. Harry Roberts denied that in his experience poor people had difficulty in obtaining therapeutic abortion (F. W. Stella Browne and others, *Abortion*, 1935, p. 141), but Mrs. Thurtle quotes instances to the contrary.

[22] Smith, *op. cit.*, p. 326.

[23] Cf. Taylor, *Medical Jurisprudence*, 1934, Vol. 2, p. 141.

Another unsound piece of advice given by the same writer is as follows: If a woman comes to a medical man after suffering an illegal operation, and he thinks that it was performed by a professional abortionist, he should refuse to have anything to do with the case unless the patient gives her permission to inform the police. The advice seems to be not only cruel to the patient but unwise for the doctor. If the advice is followed and the patient, having refused her consent to betray the abortionist and herself, dies or is injured as a result of lack of medical aftercare, she will probably have an action against the doctor, and he may as before be criminally responsible for manslaughter. He may also be held accountable for professional misconduct. The Council of the British Medical Association and the Royal College of Physicians have expressly resolved that a medical practitioner is not bound to disclose to the authorities information that he has obtained from the patient in his professional duties, and the Royal College of Physicians expressly contradicted the advice that is still contained in the current edition of Smith's work.[24] It ought to be remembered that if a woman who has been tampered with by inexpert hands feels that she cannot go to her doctor without having what she has done reported to the police, she will tend to postpone her resort to medical treatment until grave danger is present.[25]

Apart from their other doubts and fears, some doctors are afraid that the decision in *Bourne* will be reversed in some future case in which they themselves are prosecuted. It may safely be said that this fear is unfounded. It is true that according to the technical rules of the doctrine of precedent some other judge might refuse to follow the direction in *Bourne,* and his decision might be upheld by the Court of Criminal Appeal. Every lawyer knows that this is not a practical possibility. The decision in *Bourne* has received far too much approbation for such a situation to be conceivable. Even in the unlikely event of the

[24] See the resolutions printed in Parry, *op. cit.,* p. 178; Taylor, *op. cit.,* pp. 136–138.

[25] Taussig, *op. cit.,* p. 448.

Court of Criminal Appeal doubting *Bourne* as an interpretation of the law, that Court would not retrospectively reverse a decision in the realm of criminal law upon which medical men have acted.

Although a legal adviser may be firmly of this opinion, the fact remains that some members of the medical profession are still doubtful; they are surely entitled to have their doubt set at rest by an Act of Parliament.

THE THEOLOGICAL ATTITUDE

It may help to correct exaggerated views if one points out that abortion often occurs spontaneously during the early months, and the woman may not even realise that it has occurred. The practice of artificial abortion is as old as history. The earliest abortifacient recipe is more than 4,600 years old,[26] and primitive peoples all over the world have been found to practise abortion and infanticide in order to keep down the population.[27] Both Plato and Aristotle approved abortion for this purpose. Its present condemnation is the work of the Church, although one may mention that there is nothing in the Bible on the subject (surely not in the text of Genesis 'In sorrow thou shalt bring forth children'). The Church deserves the greatest credit for sharpening men's sense of the value of human life; but the question for discussion is whether, in extending its doctrine generally to the unborn child, the Church did not go too far. At the present day the Protestant Church accepts contraception and therapeutic abortion; the Roman Catholic Church rejects the former, and, at least until recently, has not permitted induction even to save the life of the mother.[28] This horror of abortion is sometimes accentuated by the idea that the unborn child dies in original sin, without having received the sacrament of baptism, with the result that it is condemned to eternal fire.[29] In order to overcome this prejudice, some American doctors in operating upon a pregnant woman take the precaution of first introducing sterile holy water into the uterus.[30]

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[26] Taussig, *op. cit.*, p. 31.

[27] W. G. Sumner, *Folkways*, 1934, Chap. 7; Taussig, *op. cit.*, p. 41.

[28] The prohibition was reaffirmed in a papal pronouncement of October 29, 1951, but after much criticism the Pope explained, on November 28, that it was confined to a 'direct killing'. If, for example, he said, the saving of the future mother's life, independently of her pregnant state, should urgently require a surgical act or other therapeutic treatment which would have as an accessory consequence, in no way desired or intended, but inevitable, the death of the fœtus, 'such an act could no longer be called a direct attempt on an innocent life'. This distinction savours of casuistry, and the limiting effect of the words 'independently of her pregnant state' is not clear. Cf., for the earlier Catholic attitude, Havelock Ellis, *Studies in the Psychology of Sex*, 1924, Vol. 6, p. 604; Parry, *op. cit.*, p. 14.

THE SOCIAL FACTS

Neither religious dogma nor legal command has ever entered fully into the popular *mores*. When a woman is faced with the prospect of having a child that will tend to impoverish her existing family, or that will disgrace her in the eyes of others, she does not generally regard an early termination of pregnancy as wrongful, though she may shrink from it for other reasons. Dr. Taussig writes: 'Every physician will testify that it is without any feeling of guilt that most women speak of induced abortions in the consultation room'.[31] It is partly because of this that although abortion laws exist in all western countries, there has been a remarkable lack of enforcement. Another reason is the inherent unenforceability of a statute that attempts to prohibit a private practice where all parties concerned desire to avoid the restriction.[32] In England in 1950 there were only 68 prosecutions for abortion, with 61 convictions; and this is a representative figure. In contrast, the number of illegal abortions, though not precisely known, is agreed by all to be staggeringly high, running into tens of thousands each year. I must try to substantiate this figure. Professor Glass thought it 'not at all improbable that there are each year about 100,000 illegal operations in England and Wales'.[33] The Interdepartmental Committee on Abortion,[34] after referring to certain statistical studies by medical officers, accepted the suggestion that there were between 110,000 and 150,000 abortions every year, and that two-fifths of these were criminal. Dr. Keith Simpson,[35] like Professor Glass, thinks this likely to be an underestimate. Dr. Eustace Chesser [36] says that his own most conservative estimate is that the figure cannot be less than a quarter of a million every year. Unfortunately these writers do not state the way in which they arrived at their conclusion. Similar high estimates are, however, made for other countries. That the problem exists in England on a large scale is indicated by Dr. Marie Stopes's report that she has had over 10,000 people who have written to her asking her to perform abortion.[37] It is pointed out that the practice is not confined to illegitimate pregnancies, but is widespread among the married, and in all classes of society.[38]

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[29] It seems that this is no longer the official attitude of any Church. The doctrine was propounded by St. Fulgentius, but called in question by St. Thomas Aquinas, who suggested the possibility of salvation for an infant who died before its birth. Recent newspaper correspondence tends to show that the doctrine is still held by individual Roman Catholics.

[30] Taussig, *op. cit.*, p. 399.

[31] Taussig, *op. cit.*, p. 403.

[32] (1935) 35 *Columbia Law Review*, at pp. 91, 94; D. V. Glass, 'The Effectiveness of Abortion Legislation in Six Countries' (1938) 2 *Modern Law Review*, pp. 97, 227; Taussig, *op. cit.*, pp. 438ff.

[33] *Population Policies and Movements*, 1940, p. 429.

[34] His Majesty's Stationery Office, 1939, pp. 9, 11.

It seems sufficiently accurate, then, to say that there is not more than one prosecution to every thousand criminal abortions.[39] In the overwhelming majority of these cases the illegal operations are performed not by proper medical practitioners (for these are successfully intimidated by the law), but by unqualified persons under septic conditions; or else abortion is procured by harmful drugs. Works on forensic medicine explain in detail the steps taken by women in their frantic efforts to end pregnancy, and no one can read them without being moved by horror and pity. The evil effects of these attempts may include insanity, blindness, paralysis and death.[40] Taussig remarks that 'a considerable portion of our knowledge of poisonous drugs is derived from the human experiments made upon themselves by women desirous of an abortion'.[41] Even if a doctor performs an operation, he frequently (if he is acting illegally) does so in secrecy, which prevents proper attention being given to the patient subsequently. Thus the effect of the law is not to eliminate abortion but to drive it into the most undesirable channels. The number of deaths following from clandestine abortions is not precisely known. The Interdepartmental Committee of 1939 quoted figures of between 411 and 605 deaths per annum attributable to or associated with abortions, criminal and non-criminal, but the Committee admitted that this probably understated the position. In the United States, where the law is similar to England, it was calculated that in 1935 there were 8,000 deaths annually from abortion; assuming 700,000 operations performed annually, this would make one death for each 87 abortions.[42] This may be compared with the position in Russia, where, between 1920 and 1936, abortion was legal and was performed in special hospitals by doctors who developed skill in the operation of curettage. It is said that the death rate was only one in 10,000 cases.[43] The difference in the mortality rate would appear to be due primarily to the abortion laws, which prevent the operation being performed under proper conditions and by proper persons.[44] Apart from causing death, unskilled abortion is gravely injurious to health, and medical practitioners are frequently called in to attend to the complications following unskilled operations. It is hard to visualise the total misery and wreckage of life that must result from this hidden social canker.

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[35] *Forensic Medicine*, 1947.

[36] 'The Law of Abortion' (1950) 72 *Medical World*, p. 495.

[37] Quoted Parry, *op. cit.*, p. 18.

[38] Smith, *op. cit.*, p. 326. The Interdepartmental Committee pointed out that illegal practitioners employ touts who canvass for custom. Dr. Lewis-Faning obtained statistics on behalf of the Royal Commission on Population by arranging for the questioning of over 7,000 women; 1 per cent admitted to having procured abortion, but Dr. Lewis-Faning remarks that it would be rather remarkable if such confessions of crime were anywhere near the actual figure. See Papers of the Royal Commission on Population, Vol. 1, pp. 165ff., 1949.

[39] This estimate of Rentoul (Parry, *op. cit.*, p. 88) is confirmed by the Interdepartmental Committee's figure in the text above.

[40] Smith, *op. cit.*, pp. 331ff.; Parry, *op. cit.*, pp. 25ff., 148.

[41] Taussig, *op. cit.*, p. 352.

PROPOSALS FOR REFORM

These facts have created considerable opposition to the abortion laws, particularly among medical men who have more opportunity to perceive the results of their working than have lawyers. Among lawyers, McCardie, J., and Mr. Claud Mullins[45] have raised their voices. The former said, in a trial at Leeds Assizes:

> 'The law of abortion, as it exists, ought to be substantially modified. It is out of keeping with the conditions that prevail in the world today. Here is a woman of most excellent character, brave in the midst of sorrow and much burdened. She has had

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[42] (1935) 35 *Columbia Law Review,* at p. 93; cf. Taussig, *op. cit.,* pp. 27–28. But Simpson, *op. cit.,* p. 163, declares that the mortality from illegal abortion in England is only .3–.4 per cent.

[43] Interdepartmental Committee on Abortion, 1939, p. 21. 35 *Columbia Law Review,* at p. 93 gives the figure of 1 in 20,000.

[44] 35 *Columbia Law Review,* at p. 93.

[45] *Marriage, Children and God,* 1933, pp. 150–153, which, however, suggests no positive conclusion.

seven children born in poverty, reared in poverty, almost doomed to poverty all of their lives. She has had no money; her husband was lazy and earned nothing. The burden fell on her. She was tired out with this burden of bearing children to a husband who would not support them. They were living on charity. I think it should be recognised that we live in the world of 1931 and not in the medieval world '.[46]

Change in the law was guardedly suggested by a committee of the British Medical Association in 1935.[47] Before that, the argument against the existing position had been stated by Dr. Charles Mercier in 1918 as follows:

'The procuring of abortion with the consent of the woman wrongs no one. It prevents the fœtus from attaining complete development, but the life of the fœtus is scarcely begun, and it is yet far from being conscious, and has not even an independent existence. It would strain the meaning of words intolerably to look upon the action as a wrong done to the fœtus, nor can it be considered a wrong to the mother, who freely and eagerly consents to it. It does, indeed, endanger the life of the mother, but I know of no instance in which an act, otherwise innocent, is regarded as a crime because it endangers the life of the actor, or in which an operation, freely consented to by the subject for the benefit to be obtained by it, is considered on the same ground a crime. No. The only ground upon which the procuring of abortion can be held to be a crime is that it infringes the racial principle. It deprives the community of a potential citizen. . . . As the potential citizen is farther from the stage of actuality than the infant, it should seem that the crime is of less gravity than infanticide; but it is in fact reprobated more severely and punished with greater severity,[48] and the reasons seem to be two: first, it attracts to itself none of the sympathy that is felt for the mother who kills her illegitimate child, and who is usually assumed to be an innocent, confiding creature who has been led away by the arts of the seducer; and second, that around the practice of abortion clings some of the odium that attaches to the arts of the pander. Both reasons seem destitute of foundation. The mother of an illegitimate child is as often as not the seducer rather than the seduced, and the women who apply to have abortion procured are in many cases married and chaste. I can discover no sound reason in ethics for the great severity with which the procuring of abortion is punished by law '.[49]

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[46] Quoted by Taussig, *op. cit.*, p. 395.

[47] *Medical Aspects of Abortion,* B.M.A. House.

[48] That is to say, in practice. In 1918, when Mercier wrote, infanticide was in law a kind of murder, as it still is if the jury are not satisfied of mental unbalance. Convictions for infanticide have always, however, been hard to obtain; and the capital sentence is regularly commuted. See Davies, 'Child-Killing in English Law' (1937) 1 *Modern Law Review,* pp. 203, 269.

Mercier's concession of the point that induction endangered the life of the mother was unnecessary, for English as well as Soviet experience has proved that if the operation is performed under proper conditions in the early months it does not do so. This is not to say that the operation is without some risk of post-morbidity; but the risk is a small fraction of that where the operation is performed illegally and inexpertly. Russian experience appears to show that the immediate danger of the operation is small, but that there is a possibility of sequelæ later, such as neurosis, particularly when the women has had no previous normal parturition. Against this must be balanced the risk of mental or emotional disturbance if an unwanted child is carried to term. Besides that, a humanitarian will wish to point to the appalling cruelty still committed against unwanted children.[50]

The whole question was considered by an Interdepartmental Committee in 1939. With one dissentient, they rejected all proposals for change in the law, except the proposal to clarify the law relating to therapeutic abortions. Even this has not been acted upon. The Committee pointed to the fact that the Soviet Union discontinued in 1936 its practice of permitting abortion, professedly on the ground that the operation had been found to have undesirable effects on the patient. The Committee rather took the Russian explanation at its face value; but another opinion would attribute the Russian change of policy to a desire to build up population for military reasons, in response to the population policies of Germany and Japan.[51] There is no doubt that Russian obstetricians regarded abortion as an evil, but some at least took the view that the legalised form of it was a lesser evil.[52] It seems from the papers printed by Dr. Schlesinger [53] that a contributory factor in the failure of the Russian experiment was the shortage of facilities for preventing conception. Abortion appears to have been treated by the populace as a normal form of birth control, instead of being (as it should be) a last-ditch measure where the birth of a child is particularly undesirable. The result was that abortion had to be carried out on a scale that was patently injurious. This shows that, whether abortion is legalised or not, it is essential to reduce the scale of the problem by energetic education in contraception.[54]

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[49] Mercier, *Crime and Criminals,* 1918, pp. 196–197. The passage is virtually repeated from the author's earlier book *Crime and Insanity* (Home University Library, n.d.), pp. 216–217.

[50] See House of Commons Debates, December 12, 1949, cols. 2431ff.; November 20, 1951, cols. 180ff.

[51] Wolff, 'Some Aspects of Marriage and Divorce Laws in Soviet Russia' (1949) 3 *Modern Law Review,* at p. 293; cf. Berman, *Justice in Russia,* 1950, p. 246. *Ibid.,* p. 286 states that popular opinion was strongly against the change, and this is borne out by the documents printed by R. Schlesinger, *The Family in the U.S.S.R.,* 1949, pp. 254ff.

Western medical opinion in Protestant countries, while regarding abortion as undesirable in itself, is prepared to regard it in some circumstances as the lesser evil. Mr. Bourne, for example, regarded it as the lesser evil in the case in which he was prosecuted. The author of the leading medical treatise on the subject, Dr. F. J. Taussig, does not favour unrestricted abortion, but he does advocate its legalisation in a number of cases not now provided for by the law.

It is, of course, always open to a doctor to dissuade his patient from the operation by pointing out any harmful effects that he thinks it may have. From this point of view it is far better that the woman should consult her own doctor, from whom she will get honest advice, than be driven to a charlatan who will give her no advice at all.

Another consideration relates to the proper limits of the criminal law. Even if the operation is undesirable, that is in itself no reason for prohibiting it by law. There is no other branch of medicine in which Parliament attempts to prescribe what is good for the patient. Even an operation like prefrontal leucotomy, which has marked effects upon character, is not regulated by law. In general we are accorded liberty in respect of our own bodies, even the liberty to abuse them. No one seriously suggests that we should be compelled to keep regular hours, to take exercise, and to eat moderately, even though such courses would undoubtedly improve the health of many of us. It is under this banner of personal liberty that a feminist movement has arisen throughout Europe, maintaining that a woman has exclusive right in respect of the functioning of her own body, including the freedom to decide whether she shall continue a pregnancy.[55] All abortion laws have been made by males, and when feminine opinion is tested it is found to be strongly in support of modification.[56] The movement for reform has been successful in Sweden, which now permits abortion for social and eugenic reasons, and has set up advisory centres.

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[52] Taussig, *op. cit.*, p. 418; for views against abortion as such, see Schlesinger, *op. cit.*, pp. 172ff. The Russian authorities adopted the 'lesser evil' attitude from the beginning in 1920 when the law was enacted; *ibid.*, p. 44.

[53] *Op. cit.*, pp. 254ff.; cf. *ibid.*, p. 18.

[54] For a criticism of English arrangements, see Thurtle, *op. cit.*, pp. 18, 28ff. The Interdepartmental Committee refused to recommend an extension of instruction in maternity centres in the use of contraceptives.

The population argument for the present law hardly merits serious attention, for if valid it should lead us to penalise not only abortion but celibacy and contraception. The argument can hardly apply to unmarried women. Even if an adequate population is necessary, it must be shown that this cannot be achieved without recourse to the criminal law. Many other legal and administrative measures could be taken to stimulate fertility, in particular by decreasing the financial disadvantages of bringing up children. The proposals of the Royal Commission on Population under this head [57] have still not been implemented.[58]

Those who object to abortion take their stand primarily on the moral issue. Abortion is abhorrent because of the sanctity of the young life that is destroyed.[59] That there is weight in this view cannot be denied. Ordinary humane, ethical and parental feeling leads one to wish to extend the protection of the criminal law not only to the newly-born child but to the viable child before birth. This protection is, however, given by the law of child destruction, and does not need the support of the abortion law. As Lord Riddell pointed out, ' the destruction of a full-grown child is a revolting affair, whereas the abortion of an early fœtus differs but little from the removal of a uterine tumour '.[60]

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[55] Havelock Ellis, *Studies in the Psychology of Sex*, 1924, Vol. 6, pp. 607ff. In Britain, the Abortion Law Reform Association advocates reform 'within such limitations as may be considered advisable', and conferences of women's organisations have passed resolutions in favour of amendment of the law.

[56] Opinion polls in Denmark and Germany are quoted by Taussig, *op. cit.*, p. 391.

[57] Cmd. 7695, 1949, p. 228.

[58] In this paper I am concerned only with the position in England. In many other parts of the world, suffering from extreme population pressure, the discovery of a simple and safe method of terminating pregnancy would prove a boon. It would allow population to be controlled otherwise than by famine, pestilence and war. 'Human fertility', said Julian Huxley recently, 'is now the greatest long-term threat to human standards, spiritual as well as material'. The present abortion laws tend to hinder research in this field. For certain possibilities, see the Interdepartmental Committee's Report, p. 61. A recent study of the conflict between social policy and moral prejudice in family limitation is Robert C. Cook, *Human Fertility: The Modern Dilemma*, 1951.

[59] A moral reason less frequently advanced is that to permit abortion would be to license incontinence. It is an odd idea that a woman is to be punished for sin by being forced to bring an unwanted life into the world. Most people would regard the argument as proving too much, for it operates equally against contraception, which society now accepts. Also, the argument does not justify the whole law of abortion, for that is not confined to illegitimate pregnancies.

The view that human personality mystically begins with the fertilisation of the microscopic ovum cannot be refuted any more than it can be proved. Opponents of the abortion law say that the line is to some extent arbitrary, as all ethical lines are. On practical grounds, if we have regard to the widespread and strong demand for abortion that in all western countries has reduced the law to impotence, it would be better to permit abortions conducted by qualified practitioners within the time when it is medically least undesirable, that is to say, the first three months of pregnancy. In practice few illegal abortions occur after this period.[61]

At rock bottom, then, we seem to come to a question of philosophy. Is the sanctity of the previable ovum a moral absolute, or are we to be allowed to look to utilitarian considerations? For the utilitarian, the welfare of every member of society must be considered, even when he is breaking the law. Punishment is an evil that can be justified, but only when the evil of the punishment (including its indirect consequences) is greater than the evil to be apprehended from the want of penal restraint. In America it was discovered that the indirect evils of prohibition far exceeded the evil at which the law was directed, and the question is whether the same proposition is not true of the law of abortion.

Those who shrink from a radical solution may at least be

[60] *Medico-Legal Problems*, 1929, p. 35. Strangely enough, Lord Riddell did not himself draw the obvious conclusion that abortion of an early fœtus should be legal.

[61] It is calculated that in the United States only 5 per cent of abortions are performed after the third month of pregnancy, and the danger of the operation to the mother increases greatly after this time: Report of Interdepartmental Committee on Abortion, 1939, p. 95. In Russia, abortion was prohibited as to pregnancies more than three months in duration, or within six months of a prior operation, *ibid.*; also prohibited or strongly discouraged for first pregnancies except for therapeutic reasons: Taussig, *op. cit.*, pp. 406, 442.

prepared to see abortion legalised (within the limits already stated) for a wider class of cases than at present. A partial change could not eliminate secret abortions altogether, but it would at any rate be an improvement upon the existing law. The strongest case is undoubtedly where the child will inherit a serious mental defect, or a serious physical defect like blindness and deaf-mutism. To allow the breeding of these defectives is a horrible evil, far worse than any that may be found in abortion; yet neither Church nor law perceives any offence to society in it.[62] Another clear case for abortion is rape. It is hard to see how any one can support a law that compels a girl to nourish within her body seed planted there by violence by a sexual maniac. Other suggested cases concern incest, and women who have borne four children.[63] Many countries that generally forbid abortion allow it for rape and incest and on eugenic grounds.[64] Even this list fails to take account of some cases. What of the woman who, already the mother of a family of three, is deserted by her worthless husband when pregnant? If the state forbids abortion in such circumstances, it must at least assume complete responsibility for the unwanted child.

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[62] Here again McCardie, J., seems to have been the only judge to take public notice of the mischief: see his remarks noted in (1932) 51 *Law Notes*, p. 2. Cf. Claud Mullins, *Marriage, Children and God*, 1933, p. 106. Whereas the breeding of degenerates passes unnoticed, it is a heinous crime for brother and sister to sleep together, even though no offspring are born.

The problem here is linked with that of sterilisation of the unfit. Much of the present opposition to sterilisation would disappear if it were generally realised that this procedure in no way interferes with sex functions. See Taussig, *op. cit.*, pp. 342ff.

[63] For all these cases, see Thurtle, *op. cit.*, pp. 57ff., and cf. Taussig, *op. cit.*, p. 448 *fin*.

[64] Thurtle, *op. cit.*, pp. 68ff.

8

OFFICIALDOM AND INFANCY

Richard O'Sullivan

In the classical and Christian tradition which gave life and energy to the common law the political community consists in the last analysis of three elements: the individual, the family and the State, that is, the King and his officials, agents whose special charge is to promote the common welfare, to maintain order, law and peace, and to administer public affairs. The good of the individual, the good of the family, and the good of the whole realm, being distinct and separate ends, were served by separate sciences. The science proper to the life and welfare of the individual was the science of ethics; the science proper to the life of the family was the science of economics; the science proper to the life of the community was the science of politics.

In this theory of things the family, which is the source of life of the individual and the State, was the first and fundamental unit of society. Marriage, in the words of Lord Westbury, is the very foundation of civil society. The rule of monogamy, based on reason and experience, is designed to secure a certain equality in the status of husband and wife, and the order and unity, in love and peace, of the household into which the children are born and in which they are brought up. The Peace of our Lord the King, we may recall, was matched by the peace of every homestead in the land. And the indissoluble character of Christian marriage, which marked the law and the life of England until the passing of the Matrimonial Causes Act, 1857, supplied for spouses and children alike a framework of social stability and security which had its foundation in natural law; in the relevant rules of biology and physiology and psychology, and in the appetites and aspirations of the human spirit: in human love and desire (which is less lasting than love) and in the need for companionship, and the ambition of the spouses to leave behind a living image or series of images of their own selves.

According to the natural law, on which, in the thought of Bracton and Fortescue and Thomas More and Christopher St. German and Coke and Hale and Holt, the common law was founded, the child belonged to the parents who were its proper and natural causes, and to whom it was bound in a distinctive group, in the material and the spiritual order, by a multitude of ties of an enduring and intimate kind. The parents were thus seen to be charged by nature with the welfare of the child and designated as its proper and exclusive guardians. Before the courts the father (or, if he were dead, his widow) stood forth as the legal representative of the family. The attitude of the common law in this respect is illustrated in the judgment of Lord Esher[1]: 'It is impossible that a testamentary guardian can be the same as a father. A testamentary guardian is a creature of the law and nature has nothing to do with it. But the law of England has recognised the natural rights of a father not as the guardian of his children but as the father, because he is the father.

'The rights of a father as guardian, if they could be limited to his rights as guardian, would probably be the same as the rights of a testamentary guardian; but the father has greater rights than those which a testamentary guardian or any other guardian can have. A testamentary guardian is not called upon to feel affection for his ward; he is not called upon to forgive the ward; he is not called upon to treat the ward with tenderness. The law recognises the rights of the father because it recognises the natural duties of the father. Now the natural duties of a father are to treat his child with the utmost affection and with infinite tenderness, to forgive his child without stint and under all circumstances. . . . The law cannot inquire in every case how fathers have fulfilled their duties. The law does not interfere because of the great trust and faith it has in the natural affection of the father to perform his duties and therefore gives him corresponding rights'. In a more recent case[2] the Court of Appeal referred with apparent approval to the answer Aquinas made when asked whether the children of Jews and unbelievers ought to be baptised against the will of their parents: The answer was 'that a child being, after its birth and until it reaches a certain maturity of mind, enfolded in the spiritual care of its

[1] *Re Agar Ellis* (1883) 24 Ch.D. 317, at p. 327.

[2] *Re Carroll* [1931] 1 K.B. 317.

parents (*sub quodam spirituali utero parentum*) it would be contrary to natural law and justice if it were taken away from its parents' custody or if anything were done to it against their will'.

According to Baron Parke (though his words invite a measure of interpretation) the law knew no distinction between infants of tender and of mature years. At common law every person under the age of 21 is an infant. On reaching the age of 21 he was said to come of age, to attain full age and capacity. He became *sui juris,* a person in his own right; a reasonable being, free and responsible; one who was his own master, and legally competent and entitled to rule his own household and maintain and educate his own children, to own and administer property, and manage his own affairs. 'The lay Englishman', said Maitland, 'the lay Englishman, free but not noble, who is of full age, and who has forfeited none of his rights by crime or sin, is the law's typical man, typical person': the free and lawful man.

In the course of the nineteenth and twentieth centuries, for the old political theory of the common law there was substituted a new theory of society and of politics. It was the invention of men who called themselves political economists. The new secular theory of the political economists began with an image of two or more men cast on an otherwise uninhabited island. Walter Bagehot complained that every treatise on political economy which he had read in his youth began with the supposition of two men cast on an uninhabited island. In this Utopia there were no families. All the problems of life and politics turned on the preference that was given to the Individual on the one hand, or on the other hand to the Collectivity. The original false analysis became one of the assumptions of political thought. 'The unit of an ancient society was the family', said Sir Henry Maine in 1861. 'The unit of a modern society is the individual'. Political society was an aggregation of individuals. The choice was limited. One might give sovereignty to the individual and declare oneself an individualist, or one might give sovereignty to the Collectivity or State and declare oneself a Socialist. Individualism and Socialism were thus two facets of one secular philosophy of politics.

The philosophy common to Individualism and Socialism was in its essence hostile to the institution of the family. The economists, who took their title from the old science of economics in its classical sense of the welfare of the family, forgot the family. The elements of social and political thinking were reduced to two. All political controversy now centred round these governing poles of interest—the Individual and the State. The Individual as distinct from the family became for a time the dominant factor in political thinking. In the supposed interest of the individual spouse (or even the spouses) all progressive opinion, as it was called, favoured the introduction of divorce and the greater and greater extension of grounds and the grant of more and more facilities for the dissolution of marriage. The enthusiasm of all sorts, even of spinsters, in the cause drew from G. K. Chesterton the memorable line:

'And our aunts who are not married
Demand to be divorced'.

The day was yet to come when spouses who had no title in their own right to a decree would have their marriages dissolved (as it was said) in the interest of the State.

The industrial system of reward for labour paid little or no regard to family responsibilities. In the course of time the instrument of taxation was used to induce more and more wives to go out to work. All the economic and moral forces in society seemed to converge towards the disintegration of the family. Children came more and more to be identified as the primary cause of poverty among adults. The birth rate suffered a sharp decline. 'Today', said Professor Titmuss, in his Lloyd Roberts Lecture (1948) on parenthood and social change, 'the area of contradiction or conflict stretches over much of our social and economic policy not because we do not care about the family but because we do not think about the family'. And he points out elsewhere that the family (which Mr. T. S. Eliot insists is by far the most important channel for the transmission of culture) has been deprived of the support and the security formerly bestowed by custom, by religion and by community life.

Meanwhile the doctrine of Collectivism, or as we now say Socialism, had gathered strength. As early as 1840, we are told, the issue between individualists and collectivists was fairly joined.[3] After 1870 (it was the year of the Education Act) the Socialist principle began to prevail. As late as 1859 John Stuart Mill in his *Essay on Liberty* had deprecated the direct assumption by the State of educational functions and argued that it ought to do no more than compel parents to provide elementary education for their children at their own cost. The Education Act of 1870 and still more clearly the Education Acts of 1876 and 1880 enforced the obligation, the parents being compellable to pay school fees. In 1891, parents of children attending school were freed from the duty of paying school fees, and free elementary education (as it was called) became a State service, controlled and guided and administered by the State and the officials of the State and local authorities.

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[3] Dicey, *Law and Opinion in the Nineteenth Century*, 1914, p. 217.

The idea of Collectivism, as Professor Dicey pointed out in 1905, is government by experts, by officials who know or think they know what is good for the people better than either any non-official person or than the mass of the people themselves.[4] According to a myth which was current at one time the State was a superior being, of infinite wisdom and infinite power—and infinite resources. The notion was congenial to those who had long taught that the first principle of the Constitution was the omnipotence and the omnicompetence of Parliament, without any reference to right or justice.

The child was now less and less under the control of its parents and more and more under the control of local and State officials. The Children Act of 1908 (as Sir John Macdonnell, Quain Professor of Comparative Law at University College, London, taught his students at the time) proceeded on the principle that the child was no longer the child of the parents; it was now the child of the State. In subsequent legislation touching children and young persons the position was made more explicit. Under various Statutes, *e.g.*, the Children and Young Persons Act, 1933, and the Children Act, 1948, an order may be made committing a child to the care of a 'fit person', who becomes in law the parent of the child. A local authority may be a 'fit person' for the purposes of these Acts. So too by section 12 of the Children and Young Persons Act, 1933, in relation to persons under their care, all the rights and powers of a parent are vested in the managers of an approved school. Once more, under the provisions of section 2 of the Children Act, 1948, a local authority may 'assume' parental rights; and by section 5 of the same Act a local authority may be obliged by the Court (without its assent) to act as a 'fit person'. Accordingly section 9 of the same Statute enacts that any reference to parents or guardians of a child shall be construed as a reference to 'all the persons who are parents of the child or who are guardians of the child'.[5]

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[4] *Ibid.*, lxxiii.

According to the Spanish proverb 'The more there is of the more, the less there is of the less'. The transfer to State and local officials of the responsibility for educating and feeding and boarding and lodging and maintaining children necessarily involves a decline in the responsibility and the status of the parent. A parent who is economically dependent on the State, and who is deprived of the responsibility of discharging his proper duties as a parent, is denied many opportunities of developing his own personality and the potentialities for good within him. 'He must increase; I must decrease'. As the official increases the parent decreases. In the course of the twentieth century, according to the testimony of Professor Glanville Williams, there came into existence, in substitution for the free and lawful man of the common law, a scarcely reasonable being whom he has called the 'statutory man'. This statutory creature, it seems, is always under age, and of uncertain sex. The ordinary man of the law is declared by Act of Parliament to be the equivalent, one might almost say the equal, of a housewife or a woman. And Mr. Douglas Jay, sometime Financial Secretary to the Treasury (in a sentence that reminds us strangely of Professor Dicey) has revealed the mind of the officials concerning the housewife: 'Housewives as a whole cannot be trusted to buy all the right things where nutrition and health are concerned. This is really no more than an extension of the principle according to which the housewife herself would not trust a child of four to select the week's purchases. For in the case of nutrition or health the gentleman in Whitehall really does know better what is good for people than the people themselves'. The words were first written down in 1935 after two whole generations of popular education. It is little wonder that the first effort of post-war extravagance was an Education Act of which we may charitably suppose that the purpose was to raise the new Statutory creature to the ordinary level of mental and moral competence.[6]

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[5] In some sense the child in an Approved School or in the care of the Local Authority as a 'fit person' is thus the child of the people: which stirs an old memory; '*filius populi*'.

Before we inquire into the achievement of officialdom in relation to infants we may notice certain statutory changes in relation to legitimate and illegitimate children. In the beginning a clear distinction was drawn. Take for example the provisions of the Fatal Accidents Act, 1846. At the time the Act was passed the benefits it conferred were limited to the relations of lawful marriage (wife, husband; parent, child; grandparent, grandchild; step-parent, step-child) of the person whose death had been caused by the wrongful act, neglect or default of another. No benefit accrued under the Act to illegitimate children, even though they may have been living with and dependent upon the deceased. In 1934 the Law Reform (Miscellaneous Provisions) Act extended the benefits of the 1846 Statute to parents or children or grandparents or grandchildren of the deceased person, even if the relationship was illegitimate or adoptive. The change was in line with other statutory changes which introduced into the English law the principles of adoption and of legitimation by subsequent marriage. By section 13 of the Adoption Act, 1949, for the purposes of certain Statutes in relation to infants[7] the definition of 'relative' was extended to mean a grandfather, brother, sister, uncle or aunt, whether of the full blood, or the half blood or by affinity, and to include, where the infant is illegitimate, the father of the infant, and any person who would be a relative of the infant within the meaning of the definition if the infant were the legitimate child of his father or his mother. It is a point of honour with our parliamentarians to put illegitimate children on the same level as legitimate children,[8] even if it is obversely to put marriage on the same level as concubinage.

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[6] In the Bill as first introduced in the House of Commons every clause of the Education Act, 1921, which saved or protected the rights of parents at common law had been carefully eliminated. The appearance in the Act of a verbal acknowledgment of some vestigial rights of parents was a concession wrung from the Minister by the immediate protests of a very few Members of Parliament.

[7] *E.g.*, Nurseries and Child Minders Act, 1948 (11 & 12 Geo. 6, c. 53).

[8] A little pamphlet lately published on the Law in Relation to the Illegitimate Child by a Joint Committee appointed by the British Medical Association and the Magistrates' Association embodies among other quaint views (to which the Council of the Magistrates' Association declares it is not necessarily committed) a proposal that the putative father of an illegitimate child should, like the mother, be empowered to apply to a Court for custody of the child.

It is an odd circumstance that the Statutes and Statutory Orders and Instruments have left us without any clear definition of the term 'child'. On the first page of the Report of the Care of Children Committee which was presented to Parliament by the Secretary of State for the Home Department, the Minister of Health and the Minister of Education in September, 1946, it is pointed out that the term 'child' is variously defined in Statutes and Orders which deal with different aspects of the problem. The term 'child' means sometimes a person under 14 years of age, sometimes a person under 16 years of age, sometimes a person under 18 years of age, and sometimes (as under the War Orphans Act of 1942) a person under 21 years of age.[9] The explanation of these differences would seem to lie in the failure of Parliament (for all its supposed omnipotence) to achieve unity and harmony in executive action, and in the interdepartmental antagonisms which are now traditional in Whitehall, and which are reflected in local administration throughout the land. Like other committees of independent persons, the Curtis Committee on the Care of Children called particular attention to these inveterate antagonisms which seem to indicate that the 'gentleman in Whitehall' suffers from a divided (not to say a split) mind. In the recent Report of a Committee to review Punishments in Approved Schools and Remand Homes we are told that 'it is often a matter of chance which of three Departments—the Ministry of Education, the Ministry of Health or the Home Office—is called upon to deal with any one difficult child. In the present chaotic situation of overlapping responsibilities many gaps exist and we have observed a tendency to suggest that any particularly difficult problem should have been dealt with by another Department. In our view the setting up of a strong Inter-Departmental Committee would be the only method of securing better justice for the problem child. We therefore recommend as forcibly as we can that such a strong interdepartmental Committee should be set up . . . to discover more exactly the size of the problem and to make suggestions for the best way of dealing with the educationally sub-normal, the maladjusted and the mentally abnormal child, both before he has become a delinquent child and after this has happened '.[10]

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[9] For other definitions of 'child', see Education Act, 1944, s. 58, Family Allowances Act, 1945, s. 2.

The regulation of the lives of children by officials rather than by parents enables a more detached and (if you will) a more scientific attitude to be adopted in the management of their affairs. As an immediate sequel, one finds in a study of the Statutes and Statutory Rules and Orders, Instruments and Official Circulars, to which it is now necessary to refer, that children who used to celebrate one day in the year as their birthday are now governed all the year round by their birth certificate. Ever since the Births and Deaths Registration Acts, 1836–1874, citizens of this realm have been obliged to register the birth of children legitimate and illegitimate. It is now a regular game to identify in the Statutes, Rules, Orders, Instruments and Circulars the detailed provisions that regulate each successive year in the life of the child. To say nothing of the protection that is given by common law and by statute to the life and interests of the unborn child, or of the admirable work that is done in so many ante-natal clinics, the Infanticide Act, 1938, enables a jury at the trial of a woman for the murder of her child under the age of twelve months to return a verdict of infanticide if in their view, at the time of the act or omission which caused its death, the balance of the woman's mind was disturbed by reason of her not having fully recovered from giving effect to the birth of the child or by reason of the effect of lactation following the birth. At the age of 2 years a child becomes eligible for entry into a nursery school. An infant under 3 years of age is protected by a section of the Children and Young Persons Act, 1933, which enacts that a person who has attained the age of 16 years, and who has custody or care of any child, may be found guilty of the misdemeanour of neglecting the infant in a manner likely to cause injury to its health if it be proved that the child died by suffocation while in bed with such other person, if that other person went to bed under the influence of drink. The child of four is the type and pattern of the new statutory creature whose life is directed by the gentleman in Whitehall. At the age of 5, a child is compelled to enter the arena of the Education Act, 1944, where primary and secondary education is provided 'in schools sufficient in number, character and equipment to afford all pupils opportunities for education offering such variety of instruction and training that may be desirable in view of their different ages, abilities and aptitudes and of the different periods for which they may be expected to remain at school'.

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[10] See Cmd. 8429, p. 11, para. 22. It seems clear that some Departments are more sympathetic than others to certain novel ideas and institutions. One imagines, for instance, that 'residential psychiatric observation centres' are more likely to find a welcome 'under the Home Office umbrella' than under the National Health Service.

It would be tedious to rehearse in their full and proper detail all the Statutes and Rules and Orders, Instruments and Circulars that govern the life of every child, in school and out of school, in each successive year, while he is a junior pupil, that is one who has not attained the age of 12 years; and while he is a senior pupil, that is one who has attained the age of 12 years but who has not attained the age of nineteen years. At 11 plus (an age which lacks any particular biological or psychological reference or sanction) children are officially 'allocated' to one or other of a variety of secondary schools or courses which are supposed, for all their diversity of type and of tradition, to enjoy what is officially called 'parity of esteem'. Despite the possibility of a re-examination and 're-allocation' at the age of 13 one may assume that the scholastic future of the vast majority of senior pupils is determined by the first allocation at the age of 11 plus.

Without entering into too much detail, we may trace the parallel life of infants before the criminal law. Until 8 years of age it is conclusively presumed that no child can be guilty of any offence. A first offender is likely to be dealt with leniently and may at worst be put under the care of the probation officer, who is the secular substitute for the parent and the parson. After the age of 10 years a young offender may be sent to an Approved School for a period which (according to his age at the date of trial) may endure for three years or until he attains the age of 15 years and 4 months, or 19 years and 6 months, as the case may be. And here we may note that the Approved Schools are used alike for infants who have been guilty of a criminal offence for which an adult could be punished with imprisonment, and for children who have merely been proved to be in need of care and protection, on the principle, it seems, that 'there is little or no difference in character and needs between the neglected and the delinquent child. Neglect leads to delinquency'. Neglect on the part of others is thus treated as the equivalent of delinquency on the part of the child. It seems on the face of it unjust, and likely to lead to the contamination of innocent children, if one bears in mind the low moral tone of many, if not most, of the young offenders, boys and girls, in the Approved Schools. Nor, while acknowledging the heroic work of headmaster and staff in such Approved Schools as that in the Cotswolds, may one overlook the 'abuses of discipline rules and decency' that have been proved in recent court cases against responsible officials in other Approved Schools.[11] One may add, in point of interest, that the system of education in the Approved Schools, which are administered by the Home Office, differs notably from the pattern followed by the Ministry of Education in the County Schools. The Approved Schools are divided into Junior Schools (boys under 13, girls under 15); Intermediate (boys 13–15, girls 14–16); and Senior Schools (15–17).[12]

An appreciable number of young offenders who have attended Approved Schools pass on to Borstal Institutions which are designed for the detention and training of infants between the ages of 16 and 21 years.[13]

A Borstal sentence is that the offender be detained in a Borstal Institution for a period of training. The period is not specified but the sentence involves separation from home and friends for a fairly long stretch of time and entails supervision for four years both inside and out of institutions. In these circumstances it is idle to pretend, as some do, that a Borstal sentence involves no punishment.

According to the statistics of discharges during the period 1944–1948, it seems that rather more than 50 per cent of Borstal trainees were reconvicted before the end of December, 1950.

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[11] See Report of a Committee to Review Punishments 1951 (Cmd. 8429, p. 12, para. 36). I omit any reference to Remand Homes and the new Classifying Schools which Mr. Basil Henriques thinks may be one cause of increased failures in Approved Schools, *Daily Telegraph,* June 14, 1951.

[12] Of late, official encouragement has been given to the idea that Approved Schools 'are properly regarded simply as Boarding Establishments approved by the Secretary of State for the education and training of boys and girls'; of whom it seems that some ninety per cent are backward in mental arithmetic. The newer schools for girls, we are told, are converted mansions which have a graciousness often lacking in the more institutional type of building: 6th Report of Children's Department, Home Office, 1951, pp. 62, 81. And see Cmd. 8429, 1951, p. 8.

[13] In this way it is possible that a boy or a girl who has committed no criminal offence and has been sent to an Approved School only as being in need of care and protection may be obliged in a Borstal Institution to mix with offenders who have a long list of convictions.

Nor can those who have not been reconvicted be rightly claimed as 'successes'; some of them may be reconvicted in the course of time; and some of them may owe the reformation of their lives to other causes. One may also demur to the claim in a recent Report that a high percentage of children are 'redeemed' in the Approved Schools. Officials are apt to be a little sanguine in the Reports of their own achievements that they prepare for sale to the public.

Notwithstanding the existence of Probation Officers and Approved Schools and Borstal Institutions it is still possible for young offenders to be sentenced to a term of imprisonment; or in a proper case to be sentenced to death. By the Criminal Justice Act, 1948, sentence of death may not be pronounced or recorded against a person convicted of an offence if it appears to the court that at the time when the offence was committed he was under 18 years of age.[14]

The power to inflict a sentence of imprisonment on an infant under 21 years of age is now severely limited. Magistrates' courts may not send to prison (in the ordinary meaning of the word) any one who is under 17 years of age. Courts of assize and quarter sessions may not do so in the case of an offender under 15. And no one, magistrate or recorder, or chairman of quarter sessions or assize judge may impose a sentence of imprisonment on a person under 21 years of age unless the court is of opinion that no other method of dealing with him is appropriate. A court of quarter sessions or a court of summary jurisdiction is in such a case obliged by statute to give the reason for its opinion that no other method of dealing with the offender is appropriate. The same obligation has not yet been imposed on the judges of the Queen's Bench Division. It would seem that the officials (and their spiritual guides) who are responsible for these changes in the law, have a diminishing respect for the competence or the honesty of magistrates and of chairmen of quarter sessions.[15]

The restrictions upon 'imprisonment' in the ordinary

[14] Here we may add that a local authority may cause to be cremated the body of any deceased child who immediately before his death was in the care of the Local Authority as a 'fit person'.

[15] The Justices of the Peace Act, 1949, provides for the setting up of Committees which will arrange for Courses of Instruction for Justices, including Juvenile Courts Justices.

meaning of the term are matched by the introduction of other and alternative methods of punishment. Thus in the case of a person over 14 but under 21 years of age, the court, which would otherwise have had power to impose a sentence of imprisonment, may order the offender to be detained in a Detention Centre for a period not exceeding six months or three months as the case may be. A person may not be ordered to be detained in a Detention Centre if he has previously been ordered to be so detained after the age of 17 years, or if he has previously been sentenced to Borstal training or to imprisonment.

Again, in the case of a person who is not less than 12 but under 21 years of age, a court of summary jurisdiction which would otherwise have had power to impose a sentence of imprisonment may order the offender to attend at an 'Attendance Centre' for a period not exceeding twelve hours in the aggregate, at such times as will interfere as little as possible with school hours or working hours, and not more than once on any day, nor more than three hours on any one occasion. No such order may be made in the case of a person who has been previously ordered to be sent to an Approved School, or to be detained in a Detention Centre or in a Borstal Institution, or who has been sentenced to imprisonment.[16]

One cannot fail to admire the patient spirit of science which has led the officials to elaborate all these careful distinctions between Young Offenders of specific ages. And to bring into existence, graded to match the age and history of each offender, such a series of institutions as we now have: Remand Homes, Remand Centres, Attendance Centres, Detention Centres, Approved Schools, Borstal Institutions; and in the background (for those of not less than 21 years of age who have been convicted on at least two occasions since attaining the age of 17 of an offence punishable on indictment with imprisonment for a term of two years or more and are now convicted on indictment of an offence punishable with a similar term of imprisonment) Institutions for Training of a corrective character to which offenders may be sentenced for a term of not less than three years.

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[16] After all this careful discrimination it is a little disconcerting to be told that the Prison Acts, 1865 to 1898, apply to Remand Centres, Detention Centres, and Borstal Institutions and to persons detained therein as they apply to prisons and prisoners. And that the statutory rules touching the registration, measurement, and photographing of prisoners apply to persons detained in Remand Centres, Detention Centres and Borstal Institutions. Archbold, *Criminal Pleading,* 1949, p. 1540.

This discrimination between Young Offenders of different ages being once made, it has been found convenient to bracket and classify into categories infants within a certain span of years. Thus, for the purposes of the Children and Young Persons Act, 1933, an infant under 14 years of age is called a child; an infant between 13 and 17 years of age is denominated a young person (a title which reminds the irreverent Sir Ernest Gowers of a Victorian butler introducing a candidate for the post of kitchen maid), while a young offender who on the day of his conviction is not less than 16 and is under 21 years of age is exquisitely described as a juvenile adult.[17]

The term 'Juvenile Delinquent' is generally used to describe all young offenders under the age of 21. Though it conveys a hint, it is less rich in pathological or psycho-pathological suggestion than the title of a recent pamphlet 'The Adolescent Delinquent Boy'. Like many of the pamphlets that nowadays appear upon this topic, it is published by the British Medical Association and is the work of a Joint Committee on Psychiatry and the Law, appointed by the British Medical Association and the Magistrates' Association. The absence from such Joint Committees of any representative judges or lawyers with a regular training and practice in the principles of English jurisprudence, nominated by the Inns of Court or the Law Society, is a regrettable feature and must greatly diminish the authority and value of the recommendations. As matters stand, some at least of the members of such Joint Committees appear to assume that juvenile crime is a matter for medical men and officials to the exclusion of representative lawyers and judges. One of two articles in *The Times* newspaper in September, 1951, on the Borstal system had the significant sub-title: 'High Proportion of *Cures* Effected'. Members of the medical profession—even of the new psychiatric or psycho-analytic branch of that profession—cannot be expected fully to appreciate or even to understand the principles of personal freedom and responsibility that give coherence and character to the English law. As an indication of the danger, one may perhaps refer to the provisions of the Criminal Justice Act, 1948, which admit the inclusion in a Probation Order of a requirement that an offender shall submit for a period of twelve months to treatment by or under the direction of a medical practitioner. The Statute in terms contemplates neuro-surgical and electrical treatment (including, one supposes, the operation of pre-frontal leucotomy) which may change the whole personality of the probationer, and in respect of which the last word appears to rest not with the citizen but with the magistrate. Such a direct invasion of personal freedom is contrary to the whole tradition of English law.

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[17] One who is between the ages of 16 and 17 years may, it seems, be at one and the same time a young person and a juvenile adult. In view of the antagonism that exists between the Ministry of Education and other Departments it is not surprising to find that for the purposes of the Education Act, 1944, a 'young person' is one over compulsory school age who has not attained the age of eighteen years.

Though they may over-reach themselves (or be over-reached) in particular instances, the desire of State and local authorities to keep abreast of the latest scientific developments has brought into existence (as we have seen) not only a whole series of new institutions but also a parallel series of new officials. Ante-natal clinics and Maternity and Child Welfare Centres and health visitors have been followed by physico-therapists and speech-therapists. Child Welfare workers and Social Welfare workers busy themselves in day and residential nurseries and in voluntary and statutory homes for children. Educational psychologists and psychiatric social workers and non-medical psycho-therapists (who do not share the same training or the same principles) collect material and make provisional conclusions which may be submitted to the consulting psycho-therapist or psycho-analyst after what is called a 'case-conference'. To all these have now been added the Children's Officer and a reinforcement of Welfare Officers who seem to be appropriate in the Welfare State. To some extent this development illustrates the statement of Professor Richard Titmuss that when, during the war, families were scattered, disorganised or distressed, it was found that once a child was separated from its mother, State action to compensate for the separation became a highly complicated affair of many officials, trained experts, institutions and organs of government.

All these officials are ceaselessly engaged in dealing with individual cases, but always in the spirit of science and research. As an example we take a passage from a Home Office memorandum circulated in July, 1949, touching the treatment of a child at a Reception Centre. After cleansing and physical and medical examination[18] an assessment must be made: 'Accurate and co-ordinated information about a child from relatives, teachers, social workers and others who have been in contact with him is an essential preliminary to a correct assessment. Such information should include an account of the child's family, his environment and history, his intellectual capacity and educational attainment, his temperament, interests and hobbies, and any symptoms of psychological disturbance or emotional difficulty which may have revealed themselves. The child himself may be one of the most useful sources of information on the illnesses he has had, the different schools he has attended and the people he has lived with. Observation should continue throughout the time he is in the Reception Centre and a record should be kept of his general behaviour from day to day and his response to other children, to adults and to the daily routine. The final assessment should be made after consideration of these Reports. . . . at a Case Conference of those who have had the child under observation. Each member of the staff of a Reception Centre, including senior domestic staff, should feel responsible for taking a share in observation and assessment. . . . The members of the staff directly concerned with the children should include one or more men.

'While the child is in the Reception Centre, the staff of the Children's Officer should be inquiring into the child's home circumstances. It is to be expected that trained boarding-out officers will be able to make a satisfactory assessment of a child's family background, but it may be necessary in difficult cases to obtain the assistance of the psychiatric social worker of the Child Guidance Team'.[19]

On a higher level than that of the Reception Centre, research techniques have also been introduced and developed with 'a full complement of members qualified in anthropology, education, medicine, psychology, psychiatry, sociology and statistics'. These

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[18] The Memorandum is included in the 6th Report of the Work of the Children's Department, Home Office, May, 1951, pp. 116–120. Note the delicate wisdom which appears in the instruction that the child's own clothes or any other belongings should be treated with respect in his presence, even if they have later to be destroyed.

[19] As a result of all these inquiries an endless series of Reports are made and circulated, many of them pure hearsay, and some of them highly defamatory of good citizens.

Research Teams direct their minds to 'the study of delinquents and near-delinquents and their social environment in search of a satisfactory answer to the problem of 'susceptibility': the question why, of a number of children, with apparently similar problems, physical and mental make-up and environment, some break down into delinquency, others into other forms of irrational behaviour, and others do not break down at all'.[20] This field of inquiry is credibly said to be of 'dismaying size'. Is it not barely possible that the actions of living and growing human beings, endowed with free will, may not be a proper subject matter for this kind of scientific research—that they are matters not of science, but of conscience?

In any event, within quite recent years, owing, it may be, to the convergence of many causes, the whole attitude of officialdom towards infants has suffered a sea change. For one thing it has been demonstrated (even in the official Reports that are published from time to time) that the 'State' as such is not endowed with any infinite or even any superior wisdom in these matters. In this way, the ghost of an old and foolish superstition has been laid. In fact, the Report of the Curtis Committee disclosed what was officially admitted to be a 'disturbing condition' of things throughout the whole range of institutions charged with the care of children, which were supervised or administered by State and local authorities. Time and again the Committee called attention (not without good reason) to the 'extreme seriousness' of taking a child away from even an indifferent home. 'Every effort should be made to keep the child in its home, provided that the home is or can be made reasonably satisfactory'. In a Home Office Circular on the Children Act, 1948, it is said: 'Where a home can be so improved that it is unnecessary to remove the child from his parents or that a child who has been taken away for a time can properly be restored to his parents' care, the advantage of this course is unquestionable. . . . Local authorities will be anxious that their officers . . . shall keep in mind the desirability of doing anything that may be possible towards the rehabilitation and education of parents and enlisting for this purpose any help that can be rendered by voluntary agencies. To keep the family together must be the first aim. The separation of a child from his parents can only be justified when there is no possibility of securing adequate care in his own home'.[21]

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[20] 6th Report of Children's Department, pp. 55–56.

If a substitute home has to be found the Curtis Committee gave preference to adoption and boarding-out with foster parents over life in institutions and communities.

The Children Act, 1948, accordingly recognises that a child should be brought up in his own home whenever this is possible, and puts the local authority under a duty to secure that a child is restored to his parent or guardian or is found a home with a relative or a friend. To safeguard the interest of parents who may object to the passing of a resolution by a local authority to assume parental rights in a particular case, it is provided that the matter shall be referred for determination to the Juvenile Court. Local authorities are now under a general duty to board out every child in their care. And, apart from adoption and boarding out with foster parents, the 'new look' in matters of child care is fashioned on the family—nursery homes, cottage homes, scattered cottage homes, family group homes, and the rest, all under the care of a house-mother or a house-mother and a house-father. The aim is always to insure that deprived children shall be brought up 'in an atmosphere of affection and security such as they might have enjoyed with good parents in their own home'.

In the light of these Statutes and Circulars and Memoranda it is clear that the family is once more recognised as the unit of society and in its way as a pattern of social activity.

It goes without saying that the welfare and the behaviour of the child depend largely on home influences. The pamphlet lately published on the Adolescent Delinquent Boy calls particular attention to the high proportion of delinquents who come from broken homes where the parents are divorced, legally separated or living apart, or where some degree of matrimonial disharmony exists.[22]

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[21] 6th Report, *supra*, p. 99 *et seq*. The doctrine is accepted in a recent pamphlet published by the British Medical Association: 'As the proper environment for the upbringing of any child is in a home and a family, the child should only be sent to an institution as a last resource'.

[22] The pamphlet is published by the B.M.A. Apprehension is also expressed lest, with the new provision of legal aid, there may be a heavy increase in the number of decrees of divorce 'which will probably have serious consequences to adolescents and children'. The reaction against easy divorce is most strikingly reflected in a Memorandum submitted to the Royal Commission on Marriage and Divorce by a leading practitioner in the Divorce Division who urges in the interests of society generally and of children in particular that facilities for divorce should be abolished or at least greatly restricted.

In a pamphlet composed by magistrates and psychiatrists, one reads, not without surprise, of the 'sanctity and responsibilities of marriage and parenthood'. 'The most unfavourable feature of the social situation is the decline in the standards of family life and parental example. . . . There has also been, all too often, a lowering of the standard of integrity, a lessening of appreciation of moral, social and spiritual values, and a decrease in the practice of true religion'.

Granted a reasonable measure of stability and reasonable standards in the home (and in the school) the child is likely to develop a right moral sense and a healthy outlook on life. For many years complaint has been made that young offenders who come before the court have had no sense of moral values, no clear appreciation of the difference between right and wrong—which reflects ill upon the parents, and the teachers, and the Ministry of Education. How, it is said, can one expect the Probation Officer, or the Approved School, or the Borstal Institution to succeed if they have to deal with young offenders who reach them without any real sense of right and wrong?[23] 'A profound faith in the possibility of ultimate success and a sincere belief in the sacred nature of the human material with which we deal are the rocks upon which all our work must depend'. These are the words of the Director of the Borstal Division.

Something of the same spirit, one imagines, animated the Home Secretary, Mr. Chuter Ede, M.P., and the Minister of Education, Mr. George Tomlinson, M.P., in summoning a Conference on Juvenile Delinquency in March, 1949, at the opening of which was read a letter from His late Majesty King George VI:

'His Majesty was very glad to learn from you of the efforts which you and the Minister of Education are making to deal with the disturbing problem of juvenile delinquency. Both the King and the Queen agree with you that insistence on a right standard of moral values, particularly when based on good influence in the home, is of supreme importance'.

To the Conference were summoned, among others, representatives of the Churches, teachers and voluntary organisations who, according to the Report of the Council of Central After

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[23] See in particular the Report of the Council of Central After Care, 1949–1950, H.M.S.O., p. 24.

Care, ' have the religious background without which any attempt at reform of the delinquent is doomed to failure '.

The sense of moral values and of the corresponding sanctity of human life gives each individual person a standing and a dignity outside and beyond the State, and a title to certain fundamental rights that may be asserted against the State or any system of States.

So at the end of our inquiry into officialdom and infancy we find ourselves in the presence of a community consisting once more of three elements, the individual, the family and the State, though it is no longer the secular State of the political economists but is now a body conscious after trial and error of its own limitations and ready, in its highest officers, to recognise and to acknowledge the existence and operation of moral and spiritual forces that give dignity to our reasonable service and direction to our life and to our law.

9

REFORM OF THE LAW OF LIBEL

Dennis Lloyd

Three years have passed since the Porter Committee published its Report on the Law of Defamation.[1] After the manner of so many excellent reports, dealing with matters which are neither of overwhelming urgency nor of vote-catching topicality, no legislation has ensued to amend the law of defamation.[1a] In the meantime, however, both the public and the profession have had ample opportunity to weigh the recommendations of the Committee and to form a view as to whether these recommendations if implemented are likely to serve the public interest. This is probably all to the good, for, in an age of much hasty and ill-considered legislation, it is very desirable that the amendment of the main body of private law should proceed along rational and consistent lines and that well-tried solutions should not be jettisoned merely because some powerful sections of the community are pressing hard for a change in the law. Merely to change the law is not necessarily to reform it.[2]

The law of defamation presents in an especially clear-cut form a conflict of interests which can only be properly resolved by carefully weighing the claims of the parties concerned. These parties are not two but three in number. They comprise the person whose reputation is impugned, the publisher of the statement reflecting on that person's reputation, and the general public. In considering the appropriate solution in any individual instance the rights of all three require to be safeguarded. I conceive the position of each of these three to be as follows: Firstly, any person is entitled prima facie to his good name, and imputations are not to be made without justification which are detrimental to his reputation. Secondly, any person should be entitled in a free democratic community to publish fearlessly statements of fact and expressions of opinion however forthright or unpopular and even though they may reflect on or displease particular individuals or groups. In addition, a writer must be free in the sphere of creative literature to publish the fruits of his imagination and art, so long, at any rate, as the guise of fiction is not used as a cloak to make unwarranted imputations upon actual individuals. Then, last but certainly not least, there is the right of the public to enjoy the benefits of a free press and to have access to factual statements on all matters of public interest and to enjoy the benefit of free and fearless expressions of opinion thereon. Needless to say, the public also has the right to enjoy all that the literature and art of the times can offer, subject only to overriding considerations of what the interests of individuals and the public itself demand. One final point I would also emphasise here and that is that the interests of the writer or publisher and the interests of the public itself are by no means synonymous. This is a confusion which is particularly apt to creep in unawares when the press is seeking to attack the alleged restraints of the present law in terms of the right of the public to a free press. The argument here is usually so framed as to suggest that the right of the newspaper to publish what it likes and the right of the reader to read what he likes are identical. No doubt there is in many instances a close correspondence between the two, but we must guard against the suggestion that the public interest can be expressed purely in terms of the freedom of the press, or vice versa.

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[1] Cmd. 7536, October, 1948.

[1a] But see note, p. 186 *et seq.*, below.

[2] Hence it is rather surprising that in the recently-published *Reform of the Law*, 1951, edited by Professor Glanville Williams, the hope is expressed that the recommendations of the Porter Report will soon be implemented, without any discussion of the merits of the proposals put forward (see p. 79).

By way of introduction to their Report, the Committee point out that the greater part of the evidence tendered to them was on behalf of persons whose avocations were such as to be likely to involve them in the risk of being sued for libel, and whose experience of the law of defamation had been almost exclusively in the capacity of defendants.[3] Authors, critics, journalists, book-publishers, newspaper proprietors, printers and newspaper distributors were particularly liable to become defendants in actions for defamation and the criticisms of the existing law from their point of view (the Committee observe) were submitted with skill, lucidity and moderation by their respective and representative organisations. Plaintiffs in actions of defamation, on the other hand, were drawn from all sections of the community, and therefore were not represented before the Committee which was obliged, in preparing its Report, to draw upon its own practical knowledge and experience in an endeavour to redress the balance. In the light of this situation, therefore, it is not without significance that of the substantive proposals calculated to assist plaintiffs only a single one was acceded to, and then only partially, whereas all those intended to relieve defendants, and particularly newspapers, were accepted by the Committee.[4] In particular the Committee seem to have been over-ready to listen to the voice of the press as the voice of freedom incarnate and to have approached the problem of the individual suing a newspaper in an atmosphere of unreality. It is assumed all through the Report that such litigants stand on a basis of complete equality and that, on the one hand, the great national newspaper is in need of the same sort of protection as the individual citizen, and that the citizen is at no disadvantage in suing such an organisation for, in the famous phrase, 'the law, like the Ritz Hotel, is open to rich and poor alike'.[5] No reference is made to the vast power and influence wielded by the modern press [6] and the perils of embarking on litigation against a newspaper which is able to take full advantage of all the technicalities of this branch of the law, and run an unfortunate litigant up to the House of Lords even on an interlocutory point without regard to the cost. Indeed, the only aspect of this question considered is whether the newspapers themselves require special protection against 'gold-digging' actions by impecunious plaintiffs, though the Committee do in fact reject any such proposal.[7] This is a complaint often voiced and it would be interesting to know what proportion of actions are settled by newspapers, where there exists a complete defence thereto, which the paper is unwilling to submit to trial owing to the lack of means of the plaintiff. Only the newspapers themselves know the answer but my guess from my own limited experience is that the number of such claims is probably negligible. My reasons for saying this are that, generally speaking, there will have been a libel published to which the newspaper has substantially no defence, but the newspaper's real complaint will be that the plaintiff is seeking to put a much graver construction on the libel than it will bear or than it thinks it will bear, and that a jury might well give only small or nominal damages. Accordingly, the plaintiff accepts an apology, his costs, and possibly a sum by way of *solatium* which may be more or less than he would recover in an action. As for the lack of means of the plaintiff, it is probably pretty rare for people entirely devoid of means to be specially sensitive of their reputations, nor on the other hand is it right to regard the impecunious person as *caput lupinum* to be defamed at discretion and without redress.

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[3] Cmd. 7536, p. 7.

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[4] Cmd. 7536, p. 46.

[5] Note also that the Legal Aid Act, 1949, has not yet been extended to defamation (see First Sched., Pt. 2, 1 (a)).

[6] See Paton, 'Reform of the English Law of Defamation' (1939) 33 *Illinois Law Review*, p. 669 *et seq.*: 'Today the power of the press to destroy the reputation of an individual is so great that strict rules are necessary to secure a balance', p. 670.

[7] Thus the Committee consider in detail the amendment of section 4 of the Libel Act, 1888, so as to grant further relief to newspapers, but do not deal with section 3, which apparently quite unjustifiably confers *absolute* privilege on newspapers in regard to judicial proceedings. See O'Sullivan, 'Evolution of the Law of Libel' (1950) 3 *Current Legal Problems*, pp. 97–98.

Before dealing with the specific recommendations of the Committee, there is one other general matter which deserves consideration in approaching the subject of the reform of the law of libel. Newspapers bulk so large these days in this field of law that this topic tends very largely to be discussed in terms of the freedom of the press. Is it true that under our present law the press labours under serious impediments which ought to be removed? Let me take as an illustration of this viewpoint an article in that very moderate and informed journal *The Economist*. Here are a few of the points made in an article published a year after the Porter Report.[8] ' Today (it is said) newspapers are small. They deal with events, politics, sex, crime and sport. It is easy to forget what is largely left out: comment on people. There is a little social gossip, rather more publicity for the entertainment world and that is all. No English newspaper could have exposed the machinations of Mr. Sidney Stanley while they were in progress, nor even undertake the kind of personal appraisals to be found in the " Profiles " of the *New Yorker*. Why? One of the main causes is fear of a libel action. It does not matter very much (except to the proprietors of the paper) if a defective law of libel compels a newspaper to pay £5,000 in damages when the fair sum should have been £500. [One may ask, in whose view is the fair sum £500—the newspaper's, the plaintiff's, or the jury's?] What does matter is that the reporter, the sub-editor and the editor may be frightened to publish what they know to be true, frightened to state a belief that they honestly hold, because a defective law of libel may make them pay for their sense of duty '. There follows a series of criticisms of the defences as they now exist to a libel action, in which the case for the newspapers is overstated by suggesting wrongly (for example) that to ' justify ' it is necessary to prove that a statement is absolutely true, and that if the published words were wrong in one single fact the defence would almost certainly fail. Inevitably the article winds up with the old bogey of the ' Camberwell Barber Case ' (what a convenient stick the rule in *Hulton* v. *Jones* has proved with which newspapers can beat the existing law of defamation!)—the reference to which concludes by stating that the plaintiff there recovered damages, but without informing the reader that the sum recovered was one farthing. Finally, the article laments that, even if the law is amended, there still remains the attitude of judges and juries, though the writer does not go so far as to contend that libel actions involving newspapers should be tried exclusively by newspaper proprietors sitting as judges and editors and sub-editors as jurors. Throughout the article there runs the undercurrent that the public interest and the freedom of the press to attack all and sundry—or, as the *Economist* puts it, ' to expose fraud, hypocrisy and evil without fear of retribution '—must necessarily coincide.

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[8] *The Economist,* October 22, 1949, p. 877.

Now I confess to being at some disadvantage in dealing with this type of criticism because I cannot pretend to first-hand knowledge of what goes on in newspaper offices. At the same time I do read a good many newspapers and it does seem to me that the picture of the news editor burning to write trenchantly on some topic or person, but palsied with fear as to the consequences, belongs to the world of Alice-through-the-Looking-Glass rather than the hard, knock-about world of Fleet Street. When I peruse my Sunday papers I concede that they contain their fair share of events, politics, sex, crime and sport, but nor do they seem to be lacking in personal comment. What, it pertinently may be asked, do the newspapers desire to be free to do? Make grossly defamatory attacks on individuals which they cannot substantiate? Or is it a grievance that the standard of proof in our courts is too high, and do the newspapers wish to be able to rely on mere rumour and assertion? It is made a complaint that no paper could have launched an attack on Mr. Sidney Stanley prior to the Lynskey Tribunal. But such an attack would have been perfectly possible if the truth of the allegations could have been proved, and is it seriously suggested that newspapers should be free to make defamatory attacks which they are unable to prove? This might be freedom for the press but it would be tyranny for the rest of the community. It is all very well to select the case of a notorious character like Mr. Stanley, and say: 'There you are, he can get away with it', but what if the attack is directed against someone who is really innocent? Is such an one entitled to no protection? The trouble is that the supporters of the press always base themselves upon the assumption that nothing is ever done by it save from the noblest of motives and with the sole desire that the truth, pure and simple, shall prevail. Unfortunately, as Oscar Wilde once remarked, the truth is rarely pure and never simple, and one cannot avoid the feeling that, if the law were to give full steam ahead to the press, it could only do so by disregarding the equally vital rights of individuals and of the public. This is not to say that there is not room for detailed improvements (as we shall see in a moment) but it seems to me entirely non-proven that the common law imposes in principle an unfair and unwarranted restraint on the press.

This type of discussion is often conducted on the footing that in America they do things far otherwise. You will recollect the *Economist's* approving glance at the 'Profiles' in the *New Yorker,* though I fail to see why those flights of journalism could not be reproduced here, if we were so minded and had a sufficiency of paper, provided they contained no untrue assertions on material matters. Here is an extract from an American lawyer, Mr. Morris Ernst, who writes from the vantage point of a considerable experience of the workings of the law of libel and who prefers the American 'set-up', though not, it seems, without some misgivings: 'For my part (he says) I prefer a society where the snooping is less flagrant than in these days in the U.S.A. The New York *Daily News* ran about 3,000 column inches of photographs, and the New York *Times* ran 528,300 words on the

Hall-Mills murder case. Entire forests are cut down to run gossip stories of impending pregnancies and/or divorces. But if there is a choice between restraining this kind of peephole business, searching into the lives of people, or permitting outrages on privacy with no holds barred, I would favour no legal restraints whatever. Rather let innumerable people suffer by cruel and often malicious and untrue gossip columns than try to draw a line of freedom for the press, a line which inevitably would limit the pen of authors, and in turn the material out of which the social history of an era is recorded. Decent limits must be developed by a folk-way, not imposed by the State '. (One would like to ask Mr. Ernst whether he is satisfied with the limits so imposed by the American folk-way and whether he would apply the same argument to the law of nuisance and of negligence.) The writer then adds : ' I'm thankful that our libel laws are not so outrageously strict as those of the British. Despite the symbol of Hyde Park, London, we in the U.S.A. have far greater freedom of press than have the people in England where libel threats put a check on all reporting and much creative writing [here again, one would be glad to be supplied with examples]. We have also drawn a cleaner line between libel and unlawful invasion of privacy '.[9] It is a rather curious comment on this forthright denunciation of restraints on the press that on another page in the same book the author writes : ' The pipelines of thought to the minds of the nation are being contracted and squeezed. About thirty men realistically dominate the conduits of thought through the ether, the printing presses and the silver screen. Without wide diversity of thought, freedom of speech and press become idle bits of a worn-out shibboleth. The cartelisation of the mind of America is well on its way '.[10] So what it appears to boil down to is that this much vaunted freedom to assail innocent people with malicious and untrue gossip is ultimately the prerogative of some thirty individuals. At this juncture you will recollect, I hope, my admonition not to confuse the interest of the public at large with the freedom of a newspaper or any other organ of publication to put forth whatever it sees fit. I would add that, so far as I can ascertain, and apart from local variations in individual States, the law of defamation in the United States seems substantially to correspond with our own law,[11] and one can only assume that the wider freedom or licence vouchsafed to the American press is not so much a matter of law but of a difference between the *mores,* or what Mr. Ernst calls the 'folk-way', of the two countries.

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[9] Ernst, *The Best is Yet*, 1945, Chap. 32 (Penguin edition, 1947, p. 212).

[10] Ernst, *op. cit.*, Chap. 10 (pp. 86–87).

I turn now to examine some of the particular respects in which our law of defamation has been criticised as defective. Undoubtedly one general criticism justly levelled against it is its unnecessary technicality and complication. Much of this technicality is tied up—as any one who is familiar with libel actions will know—with procedural matters, especially in the interlocutory stages, and there exists a whole body of rules and practices with regard to such questions as particulars, interrogatories and so forth, which greatly complicate the course of a libel action and create many snares and perils and risks of costs thrown away.[12] The Committee make a few recommendations calculated to lighten the procedural burdens (again mainly in the interests of defendants) and some of these have since been adopted by amendment of the Rules of the Supreme Court.[13] Time will not permit me to deal with such matters and I would only add the comment that it is difficult to eliminate procedural technicalities in one branch of law, where they are deeply rooted in the practice of our courts, without a more fundamental recasting of our procedural system. Such a recasting took place some 75 years ago and it may well be that it is time for a fresh instalment. But this would take us far beyond the topic of this paper.

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[11] See, for example, *American Restatement of Law of Tort,* Vol. 3, Chaps. 24–27, p. 137 *et seq.*; Prosser, *Law of Torts,* 1941, Chap. 17, p. 776 *et seq.* See the editorial notes to Paton, *op. cit.*, pp. 674, 679, 680, 683.

[12] In the third edition of Gatley's *Libel and Slander,* 1938, pp. 467–698 are devoted to the practice in actions of defamation as distinct from the substantive law.

[13] See R.S.C., O. 31, r. 1a (no interrogatories as to defendant's source of information or grounds of belief where fair comment or privilege pleaded). This has now extended the former privilege of newspapers (which was strongly criticised by Scrutton, L.J., in *Lyle-Samuel* v. *Odham's Press* [1920] 1 K.B. 135) to all defendants, and in some cases has the effect of rendering it virtually impossible for a plaintiff to prove malice; see also *Adams* v. *Sunday Pictorial* [1951] 1 All E.R. 865; O. 22, r. 4 (4) (setting off of sum paid into Court by one defendant against damages ultimately awarded against other defendants); O. 19, r. 6 (particulars of innuendo); O. 19, r. 22a (particulars of rolled-up plea), see *Cunningham-Howe* v. *Dimbleby* [1950] 2 All E.R. 882.

Of the criticisms as to substantive law, I propose to deal with these first as they affect plaintiffs, and secondly as they affect defendants.

PLAINTIFFS IN A DEFAMATION ACTION

The Committee consider five main proposals calculated to be of assistance to plaintiffs in defamation actions. Four of these they reject very summarily: the fifth is accepted but only subject to qualifications. I will say a word or two about each of these proposals:—

(1) *The right to privacy*

It has long been a source of complaint that our law is unable, generally speaking, to protect people against unwarranted intrusions upon their privacy. Many instances of such invasions would clearly be outside the scope of the law of defamation, as for instance the importuning of persons to grant interviews to the press who desire only to be left in peace, or the construction of windows enabling one neighbour to spy upon another's private activities. The relevance of this grievance to the law of libel arises in those cases where a newspaper, or other publication, insists on publishing a truthful account of the lives or doings of individuals whose status or activities are such as to stimulate the interest of the public, notwithstanding the anxiety of the subjects of this interest to remain hidden from the public gaze. Under the present law of defamation, provided the publisher is careful to state nothing but the truth, he is immune from liability. Thus the history of notorious crimes may be resurrected long after the public has forgotten them and after the criminal—having served his sentence—has achieved respectability in some remote suburb; to his horror and dismay he may find that some enterprising journalist has once again laid bare his past for the delectation of his neighbours.

The real problem, however, is to say how the law is to prevent such abuses without imposing a serious restraint on the freedom of speech. I have already stressed the important interest of the public that it should be entitled to be informed on all matters which deserve, or which attract, its attention. And if the public chooses to interest itself in the private life or activities of some public figure, who has no desire for such publicity, who is to say that the public is wrong or that its appetite is to remain unsatisfied? And where is the line to be drawn between those instances which represent a reasonable and proper purveying of information about persons in the public eye and those which can be said to be mere pandering to sensationalism and which, therefore, ought to be prohibited? As the Committee remark, the offence is primarily against good taste,[14] though whether it is much consolation to say, as do the Committee, that all *reputable* journalists deprecate the practice, is exceedingly doubtful, so long as there is a section of the profession, whether reputable or not, which in fact indulges in it.

In another part of their Report, the Committee also touch very lightly upon the question whether some remedy might not be afforded by making the defence of justification available only where the defendant can prove that the facts are both true and that it was in the public interest that they should have been published.[15] This would assimilate the civil to the criminal law but is hardly an amendment of the law which would be acceptable to the public. It would be almost impossible to foresee whether any particular fact would be held to be of sufficient public interest to warrant publication, and would thus introduce an element of guesswork into publication which might well have the effect of stifling public discussion. It is true that the same might be said of the law of criminal libel, but prosecutions for criminal libel are so rare these days and so difficult to bring home, save in flagrant cases, that it cannot be said that the threat of a criminal prosecution is an effective deterrent to the dissemination of truth.

(2) *Defamation of the dead*

Under the existing law no action can be brought for a libel on a deceased relative,[16] nor does any right of action for defamation vested in the deceased before his death survive for the benefit of his estate.[17] The Committee reject any amendment of the law on the rather curious ground ,that there is no logical basis upon which to found a right of the relatives to sue for a statement defamatory of the deceased. Surely this is a rather far-fetched example of the jurisprudence of concepts. If there is a genuine grievance are we to be put off by the specious argument that one man cannot sue for injury to the reputation of another? It may certainly cause him injury, and it is within the power of the law—logic or no logic—to grant him a remedy, if it is so minded. A more serious objection is that such a right of action might limit the writing of history and impede the historian from making a justifiable use of records and other material which would not, however, sustain a defence of justification in a court of law. This difficulty could probably, to some extent, be overcome by restricting the class of relatives entitled to bring the action to the surviving spouse, parents and children. It may be also that it would be right to exclude any claim for damages and limit the relief claimable to an injunction.

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[14] Cmd. 7536, p. 10.

[15] *Ibid.*, p. 20. This rule has been enacted in some states of Australia, and similar provisions are to be found in Illinois and Nebraska (see Paton, *op. cit.*, p. 680).

[16] Oddly enough there is no English decision on this point. For the authorities usually cited in this connection, see Gatley, *op. cit.*, p. 11.

[17] Law Reform (Misc. Prov.) Act, 1934, s. 1 (1).

(3) *Group defamation*

The inability of our law to deal effectively with statements defamatory of groups or sections of the community has been the subject of a good deal of discussion. English law takes the view that if you only contrive to spread your vilifications sufficiently widely you may do so with impunity. Provided the class selected is sufficiently large to make it impossible to say that the statements reflect on any particular individual you are quite safe, and you may denounce Jews, Catholics, Welshmen or any other group with a wealth of invective and lying assertion without exposing yourself to litigation. It is true that you may possibly find yourself at the Old Bailey on an indictment for seditious libel but such prosecutions are unpopular with juries,[18] and you will probably be acquitted in the name of that freedom of speech which lies sadly mutilated at your hands.[19]

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[18] See, for example, *R.* v. *Caunt, The Times,* October 14, 17, 18, 1947.

[19] A point not dealt with by the Committee is the rule that even where the class defamed is only quite a small and ascertainable one, no member of the class can sue unless he can show that reasonable persons would assume that he was the person aimed at (*Le Fanu* v. *Malcolmson* (1848) 1 H.L.C. 637) or that each and every member of the class was defamed (*Knupffer* v. *London Express* [1943] 1 K.B., at p. 84). Consequently the defamer can usually evade liability by casting his aspersions against (say) one of half a dozen people without saying which of them is aimed at. In such a case the fair rule might well be to allow each and every one to sue and the defendant would only have himself to thank that he has brought six actions upon himself instead of one.

The question for consideration is whether the civil law of defamation is an appropriate instrument for dealing with this species of abuse. The Committee dispose of this topic very summarily in two short paragraphs and are emphatic that—deplorable though such practices may be—no remedy is to be sought by extending the law of libel. I am bound to say, with all humility, that I entirely agree with this view, and I venture to think that any one familiar with the workings of our law of defamation must recognise that it is an entirely inappropriate instrument for dealing with anti-semites and similar propagandists. Indeed to my mind not only would such actions be technically almost impossible to handle, but they would provide the propagandist with an admirable forum to disseminate his venom before a still wider audience. It seems to me that if a remedy is to be sought in legal process, the most appropriate procedure is by way of creating an offence against public order, triable before the magistrates, and punishable by heavy fine or by a short term of imprisonment. Power might also be given to the Bench to order the discontinuance or suspension of a publication which has been the subject of two or more convictions. But this is again to take us far from the subject of this paper.

(4) *The assimilation of libel and slander*

The need to prove special damage in order to maintain an action for slander, save in certain exceptional cases, has long been recognised as one of the most unjustifiable anomalies in our law of defamation.[20] The decisions on the exceptional circumstances where slander is actionable *per se* bristle with anomalies. Perhaps one of the oddest of the cases in our Law Reports is that in which the House of Lords solemnly decided [21] that to say of the headmaster of a boys' school that he has committed adultery is not actionable *per se,* unless the adultery was actually alleged to have been committed in the course of his duties as a headmaster, for otherwise the words are not said of him in the way of his profession.[22] Almost equally curious is the recent decision of the Court of Appeal in *Hopwood* v. *Muirson,*[23] where the defendant in answer to a third person who had given the plaintiff (who was a solicitor) as a reference, wrote: 'You have got a reference from that pimp Hopwood. It is quite worthless. His very calling as a solicitor enables him to write whatever suits his clients best. Damn it, he would sue his grandmother for 7/6'. This was held not actionable *per se* as it reflected on the plaintiff as a man and not as a solicitor. Nor is it any easier to explain to a lay client why it is actionable *per se* to say of him that he suffers from venereal disease,[24] but not that he is a sufferer from smallpox,[25] or that he is insane or suffering from *delirium tremens.*[26]

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[20] For the historical origin of the distinction, see Holdsworth (1924) 40 *Law Quarterly Review,* pp. 302, 397; (1925) 41 *ibid.,* p. 13.

[21] *Jones* v. *Jones* [1916] 2 A.C. 481.

[22] Yet imputing insolvency against a trader even in his private capacity is actionable *per se*: *Jones* v. *Littler* (1841) 7 M. & W. 423.

The Committee admit that the law is arbitrary and illogical on these matters but, surprisingly enough, do not recommend a clean sweep of all this outworn rubbish. On the contrary, they confess to a feeling that really the present law is a 'not unsatisfactory compromise' and that to make all slander actionable *per se* might cause an enormous increase in litigation. It is therefore proposed that the law should be amended by extending the exceptional cases where slander is to be actionable without proof of damage to cover the case of words which naturally tend to injure the reputation of the plaintiff in his office or trade, even though they are not spoken directly in the way of his calling.[27] This certainly represents the most glaring lacuna in the present law and the recommendation is welcome so far as it goes. The Committee also recommend that broadcasting (including television) should for all purposes be treated as libel and not slander, but will make no further concessions.[28] With all respect, it seems to me that the Committee have gone completely wrong here in seeking to perpetuate an obvious anomaly out of a merely fanciful apprehension of increased litigation.[29]

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[23] [1945] 1 K.B. 313.

[24] *Bloodwork* v. *Gray* (1844) 7 M. & G. 334.

[25] *Grimes* v. *Lovel* (1698) 12 Mod. 242.

[26] The exceptions cannot extend to these, as they are not *contagious* diseases.

[27] Cmd. 7536, p. 13. Two members of the Committee, however, Mr. Richard O'Sullivan, Q.C., and Professor Wade, were in favour of assimilating libel and slander (p. 13, note).

[28] *Ibid.*, p. 13. The Committee even propose to introduce the distinction between libel and slander in a field which has hitherto been happily free from these technicalities, namely, injurious falsehood of the *Ratcliffe* v. *Evans* ([1892] 2 Q.B. 524) type (see Report, p. 15).

[29] This bogey of increased litigation has frequently proved imaginary, for example, in the case of nervous shock actions.

DEFENDANTS IN A DEFAMATION ACTION

The proposals calculated to relieve defendants in actions for defamation receive a good deal more sympathetic treatment in the Report. I will now say a few words about each of these.

(1) *Unintentional defamation*

The rule established in *Hulton* v. *Jones*[30] that the absence of any intention to defame is not in itself a defence is often put forward as showing in a striking manner the intolerable burden placed on defendants (and especially newspapers) in libel actions. No reference is, however, made to the converse position that, provided the writer wraps up his allusions sufficiently skilfully so that there is nothing in his statement which entitles a reasonable person to infer that the plaintiff was aimed at, he cannot be made liable merely because it was in fact his deliberate intention to make a covert attack on the plaintiff. For the rule that the test whether the statement refers to the plaintiff is objective and not subjective presumably cuts both ways.[31] Nor is it ever emphasised that there are only two reported English cases[32] where an action for a libel not intended to refer to the plaintiff succeeded, namely, *Hulton* v. *Jones,* where the defendants chose the most unusual name of Artemus Jones as the subject of their playful humour, and *Newstead* v. *London Express Newspapers,*[33] where a statement that one Harold Newstead of Camberwell was convicted of bigamy was in fact true, but there happened to be another Harold Newstead also living in Camberwell whose matrimonial life was entirely blameless. The plaintiff was in this latter case awarded one farthing damages by the jury with which verdict the Court of Appeal declined to interfere. The same principle was also applied in *Cassidy* v. *Daily Mirror*[34] to a case where a statement was made as to an existing person but by reason of facts not known to the newspaper it was defamatory of another person not specifically referred to. The facts in question, namely, that a person stated to have become engaged to X, was in fact already married to Y, were easily capable of being checked.[35]

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[30] [1910] A.C. 20. It is perhaps even now still arguable that the objective test is not the *ratio decidendi* of *Hulton* v. *Jones,* see Holdsworth, *Essays in Law and History,* 1946, pp. 272–283; Paton, *op. cit.,* pp. 676–678.

[31] Cf. *Bridgmont* v. *Associated Newspapers* [1951] 2 All E.R. 285.

[32] A similar rule is accepted both in the United States (*Peek* v. *Tribune Co.* (1909) 214 U.S. 185) and in Australia (*Lee* v. *Wilson* (1934) 51 C.L.R. 276).

[33] [1940] 1 K.B. 377.

[34] [1929] 2 K.B. 331. It would appear that no similar case to this was reported in the United States, at any rate up to 1939: see editorial note to Paton, *op. cit.,* p. 679.

It will be seen that any suggestion that a writer who deals with a fictitious character in a derogatory manner thereby exposes himself to endless actions by people who happen to have the same name is an absurd exaggeration. Having regard to the necessity of showing that reasonable persons did or would reasonably assume that the plaintiff was referred to, the risk of such accidental coincidences as in *Hulton* v. *Jones* (where indeed on the facts it seems clear that there was really no coincidence at all as the plaintiff was well known to the defendants [36]) is extremely remote, and there is little in that case or *Newstead's Case* to encourage bogus or even genuine claims of this sort. Moreover, the absence of any intent to refer to the plaintiff is always matter for mitigation of damages.[37]

The Committee take the view that the legal rule embodied in the decisions referred to offends one's sense of justice.[38] With all deference I take leave to doubt this. It is certainly true only on the inadmissible theory that there cannot be liability without fault, a theory never accepted by the common law.[39] There are, and always have been, examples in our law where a strict liability is imposed upon a defendant regardless of intention or negligence on the footing that the defendant has taken it upon himself to do something (not wrongful in itself) but liable to cause injury, and if injury results, then as between two innocent persons, the loss must fall not on the injured person but on him who inflicted it. I can for my part see no flagrant injustice in this especially as, in the present case, one is normally dealing with a defendant, such as a newspaper, whose powers of publicity are so great as to be even unintentionally a source of severe injury to a person defamed, and which is more likely to have the resources to bear the loss in those exceptional instances where some individual is unintentionally defamed.

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[35] See *per* Scrutton, L.J. (at pp. 341–342): 'It is said that this decision would seriously interfere with the reasonable conduct of newspapers. I do not agree. If publishers of newspapers, who have no more rights than private persons, publish statements which may be defamatory of other people, without inquiry as to their truth, in order to make their paper attractive, they must take the consequences, if on subsequent inquiry, their statements are found to be untrue or capable of defamatory and unjustifiable inferences. . . . To publish statements first and inquire into their truth afterwards, may seem attractive and up to date. Only to publish after inquiry may be slow, but at any rate it would lead to accuracy and reliability'.

[36] See *Jones* v. *Hulton* [1909] 2 K.B., at p. 454.

[37] See Gatley, *op. cit.*, p. 689.

[38] Cmd. 7536, p. 16.

[39] See the view of Sir Frederick Pollock in *Pollock-Holmes Letters*, 1942, Vol. 1, p. 16. Cf. Paton, *op. cit.*, pp. 669–671, 676–678.

The proposed remedy for this state of affairs put forward by the Committee is a little curious. The Committee recognise that it would be too drastic to deprive the plaintiff of all remedy. It is therefore recommended that, provided the defendant publish a correction and apology, the plaintiff should not be entitled to any damages.[40] How, it may be asked, is the apology to be published in a case other than that of libel in a newspaper or periodical, for example, in the case of a libel published in a novel or a circular or in private correspondence which has been allowed to circulate among the plaintiff's acquaintances? The Committee suggest that an apology in a local or national newspaper might meet the case, but in many cases this would merely serve to give the libel still wider currency. Moreover, there might be many instances in which an apology would be entirely inadequate reparation for a grave libel to which wide publicity had been given. It seems to me, therefore, that the Committee's proposal is likely to create rather than avoid injustice.

(2) *The defence of justification*

Here the Committee recommend that a defendant should be allowed to succeed in a defence of justification if he proves that so substantial a portion of the defamatory allegations are true as to lead the Court to the view that any remaining allegation which has not been proved to be true does not add appreciably to the injury to the plaintiff's reputation.[41] This is intended to cover the case where a libel contains a series of allegations and all are proved true save for one minor charge, in respect of which the plaintiff might still get damages. It is to be borne in mind, however, that even under the present law it is sufficient to prove that *the substance* of the libel is true, and even if some distinct and minor charge remains unproven the jury may well award only contemptuous damages. Moreover, costs always remain within the discretion of the Court. It may be that there is a case for some such amendment as is proposed but it seems doubtful whether it will effect any great difference in the practical result and it hardly seems to warrant specific legislation.

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[40] Cmd. 7536, p. 17. The Committee would not allow this defence where there was an absence of reasonable care on the part of the defendant. But how is this to be proved, especially now that interrogatories as to sources of information and belief are no longer permitted (see note 13, above)? The Committee think that to put the onus on the defendant would weigh the scales unduly against him in a jury action, though they leave the question open (p. 20). It is submitted that if the law is amended as proposed great injustice would be done to plaintiffs if the onus were on them to prove an absence of reasonable care.

[41] *Ibid.*, p. 20.

(3) *Fair comment*

The criticism as to this defence turns on the need to prove that *all* the facts upon which the comment is based are true. Here again it is recommended that it should suffice to prove that the facts commented on are substantially true—even though some particular fact may be untrue—provided the injury to the plaintiff's reputation is not thereby materially increased.[42] There seems to be a good case, at any rate in theory, for such an amendment of the law which has undoubtedly been developed too rigidly on this point as in the case of justification.

(4) *Privilege*

The main recommendation under this head is to extend the scope of section 4 of the Libel Act, 1888, by widening the definition of ' newspaper ' to include monthly and similar periodicals, and to extend the category of reports entitled to privilege under the section. No one would wish to quarrel with these proposals, which would bring the law more into line with present day social, economic and political conditions.[43]

(5) *Damages*

The Committee here make the rather startling recommendation that a defendant should be allowed to rely in mitigation of damages on specific acts of misconduct by the plaintiff other than those charged in the alleged libel, provided prior notice is given to the plaintiff.[44] Under the present law the defendant is limited to giving general evidence of the plaintiff's bad reputation.[45] It seems to me, with all respect, that the law has been wise to exclude such evidence not only because it may clutter up the trial with irrelevant issues, but also because it may too easily lend itself to abuse, as where a plaintiff may be deterred from bringing a legitimate libel action for fear that completely irrelevant misdeeds, committed many years previously, may be given a public airing. It is, I think, altogether wrong that a plaintiff, whose reputation may be open to criticism in some particular, should be liable to be defamed with virtual impunity on some entirely different ground.

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[42] Cmd. 7536, p. 23. Where the libel imputes corrupt or dishonourable motives to the plaintiff, it is recommended that the existing rule which requires that the comment should be reasonably warranted by the facts should remain unchanged.

[43] *Ibid.*, pp. 24–28. It is under this provision that something like the continental *droit de réponse* is given to the defamed person. The Committee would not extend this right to all the new cases of privileged reports under this proposed amendment (see pp. 26–28).

A further proposal of equally doubtful merit is that the Court of Appeal should have power to review the amount of damages awarded, and may substitute what they think is a proper sum even though the sum awarded was not so excessive or so small as to justify ordering a new trial under the present practice.[46] This means in effect that the verdict of the Court of Appeal is to be substituted for that of the jury, and whenever large damages are awarded an appeal will follow almost automatically, if only as a bargaining weapon to induce the plaintiff to settle his claim for a lesser sum. It seems to me, that, if the view is that a jury is not a fit tribunal to assess damages, it should be divested of that function openly and not deprived of it by the back door. I would add that there remains much to be said for the traditional view that a jury is pre-eminently suitable for assessing damages where these are at large and not to be arrived at by any definite rule or calculation.

The Committee also reject the suggestion that the county court should be given original jurisdiction in defamation on the ground that such actions involve difficult and technical issues.[47] This seems a very inadequate reason for taking the most obvious course available for cheapening and simplifying such actions where the plaintiff does not desire to claim heavy damages.

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[44] Cmd. 7536, pp. 35–37.

[45] *Scott* v. *Sampson* (1882) 8 Q. B. D. 491; *Hobbs* v. *Tinling* [1929] 2 K.B. 1; cf. *R.* v. *Gunewardene* [1951] 2 All E.R. 290.

[46] Cmd. 7536, p. 38.

[47] *Ibid.*, p. 47.

CODIFICATION

A final word may be said upon the question of the codification of this branch of the law. The Committee reject any such proposal on the grounds that the law is not ' ripe for codification ' and also, somewhat inconsistently, because foreign codes are apt to treat the law of tort upon ' broad and vague lines ' and that the Committee ' fear the rigidity of a code '.[48] With all deference, I would say that the Committee are right on this matter but for the wrong reasons. If the law of libel is not yet ripe for codification it never will be, and the rigidity of codes is a myth which has been entirely exploded.[49] The real argument against codification is that it would serve no purpose whatever simply to embody the existing law of defamation into what would inevitably become a ponderous and obscurely phrased statute. If there were any prospect of a serious attempt to codify our law of tort as a whole—codify, that is, in the real sense not merely of consolidating, but of recasting and rationalising its basic principles—then I would be all in favour of such a project, though I would not be very optimistic as to its ultimate outcome. But far better leave well alone than tinker with bits of the law by well-meaning legislation whose sole effect will probably be to obscure what is already reasonably clear. We have all seen enough of the modern statute at work to know that whatever else it is, it is certainly not an instrument of clarification.

If I may be permitted to sum up the results of this survey, I would venture the opinion that the Report of the Porter Committee does not disclose a strong case for the amendment of the law save in the two instances of the proof of damages in slander and the amendment of the Libel Act of 1888, and perhaps also in the case of the defence of fair comment. As to the rest of their substantive recommendations, I would say that some would be positively harmful if implemented, and the remainder are very much points of detail which hardly call for urgent legislation.

NOTE

Since the above lecture was delivered a private member's Bill

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[48] Cmd. 7536, pp. 8–9.

[49] See the author's article on 'Codifying English Law' (1949) 2 *Current Legal Problems*, pp. 170–171.

(the Defamation (Amendment) Bill) has been introduced into the Commons and has received Government support. This Bill has just (March 27, 1952) completed the committee stage and is obviously in a fair way to becoming law. The Bill is based fundamentally on the recommendations of the Porter Committee and seeks to carry most of those recommendations into law. Accordingly it was thought right to leave the text of the above lecture unaltered, as the criticisms therein contained of some of the basic assumptions and detailed proposals of the Porter Committee apply equally to the new Bill.

The main provisions of the new Bill are as follows :—

(1) Broadcast statements are assimilated to libel.

(2) Slanders affecting business or professional reputation are to be actionable without proof of special damage, whether the words refer to the plaintiff ' in the way of his profession ' or not.

(3) In the case of ' unintentional ' defamation the defendant may offer an apology, and if it is refused it will be a defence to prove that the publication was without intent to defame and without negligence. Failing agreement, the form of the apology is to be settled by the High Court.

(4) The defence of justification shall not fail by reason only that the truth of every charge is not proved if the words which are untrue are not materially injurious. There is also a similar provision in regard to proof of the underlying facts in the defence of fair comment.

(5) Privilege is extended to reports on a large number of public activities contained in newspapers and periodicals. (The extremely wide range of such activities brought within this privilege seems to go much further than is necessary, *e.g.*, it extends to reports of findings of bodies controlling any trade, business, profession or sport, and even to reports of ' hand-outs ' of government departments.)

(6) Evidence is admissible in mitigation of damages that the plaintiff has recovered damages or brought other actions for damages in respect of similar defamatory statements.

The main result of the committee stage in the Commons appears to have been the deletion of a clause permitting evidence in mitigation of damages to be adduced of any facts relevant to the character of the plaintiff. (The possibility of such a clause being reintroduced in an amended form was not, however, excluded.) Several amendments were proposed to bring ' group libel ' within the ambit of the law, but these were rejected. One proposal was that it should be made an offence punishable by two years' imprisonment to defame any group distinguishable by race, creed or colour, the fiat of the Attorney-General or the consent of the Director of Public Prosecutions being necessary to institute such proceedings. This would be to make a State trial out of any such prosecution. Another proposal was to allow any member of such a group to sue for defamation with the leave of the Attorney-General. The task of such a self-chosen plaintiff would certainly not be an enviable one. It remains difficult to see why the creation of an offence triable summarily would not meet the case, save for an exaggerated apprehension as to the extent to which such an offence would or could encroach on the freedom of speech.

Not unnaturally, the new Bill has been greeted with acclamation by the press, as though a new age of liberation had dawned. As one journal put it, a little naïvely, ' a resounding blow will have been struck for freedom of speech, particularly of the press '. The comment by Sir Lynn Ungoed-Thomas on the second reading seems particularly apposite, when he observed that it was important to have freedom of the press, but it was also necessary to remember the power of the press. ' Some of the press (he added) strongly support the Bill. They are substantial beneficiaries. The Bill as a whole is undoubtedly a defendant's Bill '.[50]

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[50] See *The Times,* February 2, 1952.

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THE 'DIRECT' CONSEQUENCES OF A NEGLIGENT ACT

D. J. PAYNE

THE headnote of the decision of the Court of Appeal in *Young v. Bristol Aeroplane Co.*[1] states that 'the Court of Appeal is bound to follow its own decisions and those of courts of co-ordinate jurisdiction. . . . The only exceptions to this rule are :—. . . (2) The Court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords'. This rule regarding implied overruling is confined in terms to the Court of Appeal, but the problem is one that may on occasion confront a court of any rank. What, for instance, is the duty of a High Court judge who thinks that decision X of the Court of Appeal cannot stand with a later decision Y of the House of Lords? Should he give effect himself to what he thinks is the true effect of the House of Lords' decision, or should he leave this task to the Court of Appeal? Unless we admit that the correct law on a certain point is relative to the particular court we have in mind, it seems that a judge of whatever degree must, in the ordinary course of determining the law, resolve apparent conflicts in decisions given by courts above him in the hierarchy. This, at least, is what was done recently by a Divisional Court of the King's Bench, which held itself entitled to disregard a decision of the Court of Appeal on the ground that a relevant decision of the House of Lords had not been cited.[2] It is true that a trial judge who takes it upon himself to resolve conflicts in higher courts may be reversed upon the point of conflict by the Court of Appeal. The point can be finally settled only by the House of Lords itself, in which event the House may of course, in reversing the Court of Appeal, vindicate the opinion of the trial judge.

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[1] [1944] K.B. 718.

[2] *R. v. Northumberland Compensation Appeals Tribunal* [1951] 1 K.B. 711 ; Allen, *Law in the Making*, 1951, p. 236.

In 1947 Denning, J. (as he then was), in the course of an appeal from a Pensions Appeal Tribunal,[3] expressed the opinion that it was doubtful whether the well-known Court of Appeal decision in *Re Polemis*[4] could survive three later decisions of the House of Lords, namely, *Donoghue* v. *Stevenson*,[5] *Bourhill* v. *Young*,[6] and *Woods* v. *Duncan*.[7] The learned judge's opinion, though undoubtedly *obiter*, is of great interest and cannot be disregarded. More recently, the Court of Appeal, in *Thurogood* v. *Van Den Burghs & Jurgens*,[8] have held that *Re Polemis* is not inconsistent with these three decisions of the House and that the Court is still bound by the *Polemis* rule. 'The utmost that can be said', said Asquith, L.J. (with whom the other members of the Court concurred), 'is that certain of the Lords of Appeal in Ordinary have reserved the right to reconsider [*Re Polemis*] if and when, before the House of Lords, its authoritative character should come directly in issue'.[9] I propose in this paper to consider what course the House is likely to follow should that occasion arise. For this purpose I shall consider chiefly the three House of Lords' decisions cited by Denning, J., as having impliedly overruled *Re Polemis*, concluding with a brief examination of the leading authorities on which the Court of Appeal relied in that case.

THE NATURE OF THE PROBLEM

Before *Re Polemis* there were, as is well known, two conflicting schools of opinion as to the proper test of remoteness of damage in the law of tort. According to the first school, the foresight of a reasonable man in the circumstances both determines whether or not a person had been negligent and also limits the consequences for which that person is liable if proved to be negligent. Since negligence, it was said, consists in failing to provide against the foreseeable consequences of one's conduct, responsibility should extend only to those consequences which were foreseeable and in respect of which one's conduct was

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[3] *Minister of Pensions* v. *Chennel* [1947] K.B. 250, at p. 254.

[4] *Re Polemis & Furness, Withy & Co., Ltd.* [1921] 3 K.B. 560.

[5] [1932] A.C. 562.

[6] [1943] A.C. 92.

[7] [1946] A.C. 401.

[8] [1951] 2 K.B. 537.

[9] At p. 555.

'negligent'.[10] According to the second, 'the question what a reasonable man might foresee is of importance in considering the question whether there is evidence . . . of negligence or not, . . . but when it has once been determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not'.[11] The Court of Appeal in *Re Polemis* pronounced in favour of the latter view.

The facts of *Re Polemis*,[12] as found by the arbitrator, compelled the Court of Appeal to choose between the two conflicting views found in the earlier cases. While engaged in moving a number of cases of petrol from the hold of a ship to one of the 'tween-decks, stevedores, employed by and in law the servants of the charterers, dropped into the hold a plank, which, in falling, struck a spark and ignited a quantity of petrol vapour that had accumulated in the hold from leaks in some of the cases. The fire thus started destroyed the whole ship. In a claim by the owners against the charterers for the value of the ship, the arbitrator found that the charterers had been negligent, through their servants, in dropping the plank into the hold, but 'that the causing of the spark could not reasonably have been anticipated from the falling of the board, though some damage to the ship might reasonably have been anticipated'.[13] On these findings the arbitrator awarded the owners the whole value of the ship, nearly £200,000; and the award was affirmed both by Sankey, J., and the Court of Appeal. All three members of the Court of Appeal agreed that what the charterers might reasonably have foreseen was relevant only to the question of whether they were negligent, and to the determination of 'the legal quality of the act as negligent or innocent'. Once proved to be negligent, the charterers were liable for all the 'direct' consequences of their act, whether or not they could have foreseen them.

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[10] *E.g.*, Pollock, C.B., in *Rigby* v. *Hewitt* (1850) 5 Ex. 240, at p. 243 and *Greenland* v. *Chaplin* (1850) 5 Ex. 243, at p. 248; Brett, J., in *Smith* v. *L. & S.W. Rly.* (1870) L.R. 5 C.P., p. 103; Bovill, C.J., and Grove, J., in *Sharp* v. *Powell* (1872) L.R. 7 C.P. 253, at pp. 258, 259; Cockburn, J., and Manisty, J., in *Clark* v. *Chambers* (1878) 3 Q.B.D. 327; Vaughan Williams, L.J., in *Cory* v. *France* [1911] K.B. 114, at p. 122; Bowen, L.J., in *Cobb* v. *G.W. Rly. Co.* [1893] 1 Q.B. 459, at p. 464.

[11] Channell, B., in *Smith* v. *L. & S.W. Rly.* (1870) L.R. 6 C.P. 14, at p. 21; see also Kelly, C.B., and Blackburn, J., *ibid.*, at pp. 20 and 21; Parke, Alderson, Rolfe and Platt, BB., in *Rigby* v. *Hewitt* (1850) 5 Ex. 240; Evans, P., in *H.M.S. London* [1914] P. 72, at p. 78; Lord Sumner in *Weld-Blundell* v. *Stephens* [1920] A.C. 956, at p. 984.

[12] [1921] 3 K.B. 560.

[13] There is force in Professor Goodhart's contention that the arbitrator's finding of fact was perverse, in that a reasonable man ought to have foreseen that the plank in falling might ignite the petrol vapour: *Essays in Jurisprudence and the Common Law,* 1931, p. 146.

Though each member of the court adopted 'directness' as the criterion of remoteness of damage and stated that the calamitous consequences in the case before him were 'direct', none suggested any test whereby 'direct' are to be distinguished from 'indirect' consequences.[14] The use of the term was suggested by Lord Sumner in a passage from his judgment in *Weld-Blundell* v. *Stephens*,[15] then recently decided, which all three members of the court either quoted or referred to with approval. We shall consider later how far, if at all, the Court of Appeal was justified in citing Lord Sumner's authority for its interpretation and application of the term 'direct'. Lord Wright, in *Liesbosch Dredger* v. *Edison S.S.*,[16] thought that *Re Polemis* 'was concerned with the immediate physical consequences of the negligent act'. Sir Percy Winfield,[17] though he accepts the *Polemis* decision, points out that it has been largely ignored by the courts and that 'both before and after the *Liesbosch Case* some distinguished members of the Court of Appeal stated the rule of remoteness in phrases which, even if consistent with *Re Polemis*, were nevertheless not coincident with the rule laid down there'. He concludes that, despite the rejection by the Court of Appeal in *Re Polemis* of the relevance of reasonable foresight to the question of remoteness, the criterion of 'directness' in the great majority of cases is in fact, 'Would a reasonable man have foreseen the consequences?' Only where the consequences are physical, that is to say, ensuing 'in accordance with the scientific laws known to govern the world', may they continue to be 'direct' even though a reasonable man would not have foreseen them. It is thus only where, as in *Re Polemis* and *Smith* v. *L. & S. W. Rly.*,[18] a direct chain of physical cause and effect can be traced between the act of the defendant and the damage suffered by the plaintiff that the defendant will be held responsible for consequences beyond those he might reasonably have foreseen. Even where the consequences are physical, the test of directness will in most cases lead to the same result as the test of reasonable foresight, since the physical consequences of his acts will generally be foreseen by the reasonable man.

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[14] Bankes, L.J., at p. 571; Warrington, L.J., at p. 574; Scrutton, L.J., at p. 577.

[15] [1920] A.C. 956, at p. 984.

[16] [1933] A.C. 449, at p. 461.

[17] *Law of Tort*, 1950, p. 70 *et seq.*

[18] (1870) L.R. 6 C.P. 14.

This valiant synthesis of the cases does, of course, leave the actual decision in *Re Polemis* intact. Narrow though the scope of it is, it may still be cited for the proposition that the damages awarded against a negligent actor in English law need bear no relation to the magnitude of his fault, and that the 'legal quality' of an act is determined once for all by reasonable foresight of the slightest degree of harm without reference to the disastrous consequences that have in fact ensued. It is submitted that the adoption of the 'direct' criterion of remoteness confuses what are, except possibly in torts of strict liability such as *Rylands* v. *Fletcher*,[19] two distinct problems: those of causation and responsibility.

Man, as a rational animal, is able, by virtue of his perception of cause and effect in the physical world and his knowledge of the behaviour and reactions of human beings and animals, to foresee certain future events as possible or probable. The law, in the interest of social order, sometimes casts upon him a legal duty to guard against these foreseeable events, whether they be the physical consequence of his own conduct or of the conduct of another. The laws of cause and effect in nature are relevant to responsibility only to the extent that a man's foresight of the consequences of his actions will often be dependent on his knowledge of these physical laws. The responsibility of a child or lunatic for the injurious consequences of his acts is less than that of a sane adult, not because those consequences are any the less due to the operation of physical laws of cause and effect, but because the immaturity or disease of the mind limits his vision into the future. The courts have acknowledged this in dealing with a plea of contributory negligence raised against a child; the success of such a plea will depend on the maturity of the child and not on the extent to which the child has physically contributed to the injury; see, for example, *Yachuk* v. *Oliver Blais & Co.*[20]

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[19] (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330.
[20] [1949] A.C. 386 (J.C.).

The actions of human beings and animals are not generally thought to be governed by immutable laws of cause and effect. This, however, does not preclude a forecast of what human beings and animals are likely to do in certain circumstances. Thus the law has found no difficulty, in recent years at least, in holding defendants responsible for harm inflicted on plaintiffs through the intervention of third parties, where the intervention was foreseeable and where the defendant did in the circumstances owe the plaintiff a duty of care: see *Haynes* v. *Harwood*[21]; *Stansbie* v. *Troman*[22]; *Davies* v. *Liverpool Corp.*[23]; and *Philco Radio Corp. Ltd.* v. *Spurling.*[24] In such cases it is impossible to trace any chain of physical causation between the act of the defendant and the injury of the plaintiff, and the courts have necessarily resorted to the criterion of reasonable foresight in determining remoteness of damage.

Even in those cases where, as in *Re Polemis,* a thread of physical causation can be traced between the defendant's act and the plaintiff's injury, the application of the direct or physical test of remoteness may lead to no certain answer to a problem before the courts. Many factors contribute to every physical event and each factor may be said scientifically to be a direct cause. Any singling out of one factor as the chief or effective cause probably results from our concentrating on the factor that is novel and so obvious, and ignoring the many that are not. Let us consider the facts of a hypothetical problem. X, a cinema owner, covers the floor of the auditorium of his cinema with carpeting supplied by Y. The dyes in the carpet are, unknown to both X and Y, highly inflammable, though Y should have known of this. P, while sitting in the cinema, stubs out a cigarette end on the carpet instead of placing it in the ash-tray provided, and in so doing ignites the dye in the carpet. The resultant fire destroys the cinema with great loss of life. On such facts the adherents of the *Polemis* rule could hardly avoid the conclusion that the 'legal quality' of P's act was negligent, since some foreseeable damage might result from stubbing out a cigarette end on a carpet. The only question at issue therefore would be whether or not the conflagration was the direct consequence of P's act, and on any test of physical cause it undoubtedly was. P would thus, on the basis of *Re Polemis,* be liable for all the damage suffered. Despite the intervention of P, it is almost certain that Y, the supplier of the carpet, would be liable also, on the ground that the act of P, though wrongful, was yet reasonably foreseeable by Y. It is interesting to speculate on the principles on which a court would apportion the damages between P and Y: whether on the principle of moral accountability,[25] which must be related in some way to foresight, or on principles of causation.[26] If, as seems probable, the court apportions on the basis of moral accountability,[27] the apportionment would, on the assumption that the far greater fault is in Y, virtually nullify the application of the *Polemis* rule as regards P, who would be morally accountable for merely a burn in the carpet. The extent of P's liability for the disaster would thus depend on the fortuitous circumstance of there being some other person liable in respect of the same tort.

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[21] [1935] 1 K.B. 146.
[22] [1948] 2 K.B. 48.
[23] [1949] 2 All E.R. 175.
[24] [1949] 2 All E.R. 882.

THREE HOUSE OF LORDS' DECISIONS SINCE 'RE POLEMIS'

Having illustrated some of the objections in principle to the *Polemis* rule, let us now examine the three decisions of the House of Lords which Denning, J., thought inconsistent with the rule. The first of these is *Donoghue* v. *Stevenson.*[28] At first sight it is difficult to see in what manner that decision could affect the *Polemis* rule, for no problem of remoteness was there directly in issue. The importance of the decision lies, however, in its indirect rather than its direct results. In establishing negligence as a tort in itself, and not merely a possible ingredient in other torts, the courts have found it necessary to define with greater accuracy the term 'negligence'. The term may no longer be applied in a vague and abusive way to conduct thought in some manner to be reprehensible: negligence consists in the breach of a legal duty to take care owed to the person who complains of the breach. Where there is no duty owed to the plaintiff, then the defendant's conduct cannot properly be stigmatised as negligent. Whether or not a duty is owed will generally depend on what the defendant ought reasonably to have foreseen. In Lord Atkin's words: 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour', and he goes on to define neighbours as 'persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question'. Though the Court of Appeal in *Re Polemis* did not relate the dropping of the plank in that case to the breach of any duty of care owed by the charterers to the owners of the ship, the decision can admittedly be brought into accord with the reasoning in *Donoghue* v. *Stevenson* by the arbitrator's finding that some slight damage to the ship was the foreseeable consequence of dropping the plank, and by arguing *ex post facto* that such foresight gave rise to a duty of care. But had the facts of *Re Polemis* been slightly different and the only foreseeable damage been some slight damage to the property of some third party in the hold, the court would have been compelled to hold that a duty of care was owed only to that third party and that the owners could not found an action on the breach of the duty owed to him.

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[25] *Weaver* v. *Commercial Process, Ltd.* (1947) 204 L.T.J. 59.

[26] *Collins* v. *Herts C.C.* [1947] K.B. 598, at pp. 623–624.

[27] Winfield, *op. cit.,* pp. 174–175.

[28] [1932] A.C. 562.

The House of Lords had to deal with a problem of this nature in *Bourhill* v. *Young*,[29] the second of the decisions mentioned by Denning, J. The facts of that case, as given in the headnote, were as follows: 'A motor cyclist, while negligently driving at excessive speed, collided with a motor car and was killed. The appellant, a fish-wife, standing about 45 feet from the point of impact on the far side of a stationary tramway car from the platform of which she was unloading her basket, heard the noise though she did not see the accident, and suffered fright resulting in severe nervous shock which disabled her from carrying on her trade for some time, although she admitted that at the time she had no reasonable fear of immediate bodily injury to herself. At the time she was eight months pregnant and about a month later the child was stillborn, owing to the injuries sustained by her'. The House of Lords held that the appellant could not recover damages for her injuries from the motor cyclist's executor. If we accept the suggestion of Lord Wright and Sir Percy Winfield that consequences are 'direct' if they ensue in accordance with scientific law, there seems little doubt that the injuries sustained by the appellant in *Bourhill* v. *Young* were the direct consequence of the motor cyclist's colliding with the motor car. Moreover, the House was unanimous in agreeing that so far as the driver of the car was concerned the deceased had undoubtedly been negligent. The appellant's claim failed on the ground that, situated where she was at the time of the collision, the motor cyclist could not reasonably have foreseen injury to her, and therefore owed her no duty of care. She was beyond 'the area of potential danger' and could not found an action on the breach of a duty owed to another. Though, in the absence of any duty of care, the House was thus absolved from deciding any question of remoteness of damage, those passages in their Lordships' judgments where they advert to the problem lead one to doubt whether, had the necessity arose, they would have approved the *Polemis* rule.

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[29] [1943] A.C. 92. The appeal was from the Court of Session in Scotland, but Scottish law was treated as being identical with English law on the point at issue.

The problem may be stated in this form: If the appellant had been standing at such a point as to be within the area of reasonably foreseeable injury, and thus a person to whom the motor cyclist owed a duty of care, would she have recovered damages for the injuries she did in fact sustain, even though those injuries (that is to say from nervous shock) could not reasonably have been foreseen? Or, in other words, would the appellant, being owed a duty of care, have recovered damages for her injuries even though they could not have been foreseen and were in fact due to her unusual susceptibility to shock? Lord Thankerton [30] and Lord Porter [31] both expressly reserved their opinion on the correctness of *Re Polemis,* though Lord Porter later in his judgment expresses a view which appears to be inconsistent with it. After stating that no duty would be owed to a person unless he was 'in such a position that direct physical injury could reasonably be anticipated' to him, he goes on to say, 'and if, *in addition,* no shock was reasonably to be anticipated' to him 'as a result of the defender's negligence, the defender might, indeed, be guilty of actionable negligence to others but not of negligence' to him.[32] It therefore seems that the learned Lord thought the foreseeability of the shock essential to liability whether or not the appellant was within the area of potential physical injury.

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[30] [1943] A.C. 92, at p. 100.
[31] At p. 113.
[32] At p. 117. Italics supplied

Lord Russell of Killowen, though he does not mention *Re Polemis,* states a view directly opposed to it in the following passage: 'In considering whether a person owes to another a duty breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man. This consideration may play a double role. It is relevant in cases of admitted negligence (where the duty and breach are admitted) to the question of remoteness of damage, *i.e.,* to the question of compensation not to culpability, but it is also relevant in testing the existence of a duty as the foundation of the alleged negligence, *i.e.,* to the question of culpability not to compensation'.[33] Lord Macmillan, though recognising with the rest of the House that the correctness of *Re Polemis* was not in issue, doubted whether it represented the law of Scotland and could 'cite ample authority to the contrary'.[34] Only Lord Wright cited the decision with approval, though even he thought the rule was confined 'to "direct" consequences *to the particular interest of the plaintiff which is affected'*.[35] He seemed, moreover, to be prepared to distinguish, should the need arise, between the plaintiff's interest in freedom from direct physical injury and his interest in freedom from nervous shock, for he states that the duty 'owing to members of the public *who come within the ambit of the act,* must generally depend on a normal standard of susceptibility'.[36] But so to limit the operation of the *Polemis* rule is virtually to destroy it. For example, in the hypothetical case of the cinema fire we posed earlier, it might be argued that the cinema owner's interest in not having his cinema destroyed by fire is distinct from his interest in not having cigarette ends stubbed out on his carpet, and that since only the latter interest was foreseeably affected by P's negligence therefore no action will lie for direct injuries to the former. But this is merely a roundabout way of confining the right of recovery to foreseeable injuries.

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[33] [1943] A.C. 92, at p. 101.
[34] At p. 106.
[35] At p. 110. Italics supplied.
[36] At p. 110. Italics supplied.

In a recent article[37] Lord Wright (who supports the *Polemis* rule), in dealing with the various issues that may arise in an action of negligence, says: 'A plaintiff may fail on liability because he has failed to establish (1) duty to him, (2) breach of that duty, (3) damage to him directly caused by breach of that duty. Proof of the duty on which responsibility depends may be established in different ways. The duty must be specifically due to the plaintiff *and to some particular interest of his, e.g., his personal security in some aspect or in regard to some property*'.[38] This, it should be noted, is not the same rule as that suggested by Lord Wright in *Bourhill* v. *Young*. There the *damages* were to be limited to the particular interest of the plaintiff likely to be affected: here the duty itself is confined to 'his personal security in some aspect, or in regard to some property'. Should damage result to some interest of the plaintiff's which the defendant could not reasonably expect to be affected, an action in respect of that damage will fail, not because the damage is too remote, but because no duty would be owed to the plaintiff in respect of that interest. Though Lord Wright cites no authority for relating and confining the duty to particular interests of the plaintiff, and though the present writer has found no judicial statement of this view in the cases except for the above-mentioned passage from Lord Wright's own judgment in *Bourhill* v. *Young*, it is submitted that the rule is implicit in the modern development of the law of negligence.[39] It is further submitted that such a rule is inconsistent with *Re Polemis*. The reasoning underlying that decision was that the 'legal quality' of an act was determined for all purposes by foresight of some degree of injury. The House of Lords in *Bourhill* v. *Young* held that an act has legal quality only in relation to particular persons, and that the same act may at once be negligent in relation to one person and blameless in relation to another. If negligence is further related not only to persons but also to distinct interests, it follows that in regard to one person an act may be negligent in respect of one of his interests and yet innocent in respect of others. But, as we have already shown, if we limit the application of the *Polemis* rule to direct injuries to those interests of the plaintiff reasonably likely to be affected, we do in effect destroy the rule.

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[37] *Re Polemis* (1951) 14 *Modern Law Review*, pp. 393, 398.

[38] Italics supplied.

[39] Cf. Cardozo, C.J., in *Palsgraf* v. *Long Island R.R.* (1928) 248 N.Y. 339, at p. 346: 'There is room for argument that a distinction is to be drawn according to the diversity of interests invaded by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property results in an unforeseeable invasion of an interest of another order, as, *e.g.*, one of bodily security. Perhaps other distinctions may be necessary. We do not go into the question now'; cited Goodhart, *op. cit.*, p. 149.

I now turn to the last of three decisions mentioned by Denning, J., namely *Woods* v. *Duncan*.[40] That case arose from the disaster to the submarine *Thetis* in 1939. Representative actions were brought by the widows of two of the men who perished in the submarine against Cammell Laird & Co., the builders, and certain other defendants with whom we are not here concerned. The *Thetis* was equipped with six torpedo tubes, each of which was sealed, from the sea by a power-operated bow-cap whose position was reflected on a mechanical indicator inside the submarine, and from the interior of the submarine by a hand-controlled door. Either the bow-cap or the inner door had always to be closed in order to exclude the sea. Behind the lever which secured the inner door of each tube was a safety device in the form of a test-cock, through a hole in which a jet of water was meant to shoot out if any attempt was made to open the inner door while the tube was full of water. Owing to the fault of Cammell Laird the test-cock hole in one of the inner doors was completely blocked by the heavy paint with which the inside of the tubes had been painted. W, the torpedo officer, wishing to inspect the inside of this torpedo tube, and mistakenly though reasonably believing (so the House held) that the bow-cap was closed, opened the inner door, from which no warning jet shot out, and so let in the sea. In consequence the submarine foundered with great loss of life. The House of Lords unanimously held that Cammell Laird were not responsible for the death of the two deceased men, though their Lordships' judgments exhibit a variety of reasons.

Viscount Simon thought that negligence was made out, but that it was not the legal cause of the disaster. 'It is easy to anticipate', he said,[41] 'that faulty signals are likely to produce a railway accident, but could Cammell Laird reasonably have in contemplation . . . that those on board would be put in mortal

[40] [1946] A.C. 401.
[41] At p. 421.

peril if these holes were blocked?' Lord Russell, too, thought that 'no such foresight could reasonably be expected' of Cammell Laird.[42] Lord Macmillan thought the 'chain of causation' was snapped by the improbability that the clogging of the test-cock would lead to the loss of the submarine.[43] Lord Porter, on the other hand, thought no question of 'measure of damage' arose at all, and he appears to have followed the reasoning of *Bourhill* v. *Young* in holding that though Cammell Laird were 'negligent' in respect of the clogged test-cock, they would not be negligent towards the deceased men unless they should have foreseen the possibility of injury to them. Finally, Lord Simonds, though he too thought the 'chain of causation' had been broken and that, though 'Cammell Laird were negligent in not detecting the obstruction to the test-cock, their negligence in that respect was not the cause of the accident', nevertheless emphasised that he was not 'here considering the question whether the damages are too remote, though there too the question of foreseeability may be vital'.[44]

The only member of the House who considered the decision in *Re Polemis* was Lord Porter, and he, having dealt with the problem before the House as one involving the existence of a duty of care and not any question of remoteness, held it to be not in point. 'Your Lordships are concerned', he said, 'with the earlier question whether (Cammell Laird) were negligent towards the two men whose widows are making a claim—a question similar in character to that discussed in *Bourhill* v. *Young*'.[45] But as we have shown, Lord Porter was alone (with the possible exception of Lord Simonds) in treating the case as involving no question of remoteness: the other members of the House all agreed that Cammell Laird had been negligent, but that their negligence had not caused the disaster, and, in holding that Cammell Laird were not liable, they all applied the criterion of reasonable foresight of consequence.

The decision, even more than the reasoning of the majority, goes far to destroy the *Polemis* rule. Though their Lordships did not explain in what manner Cammell Laird were 'negligent' if (as they all held) the injuries to the deceased men could not have been anticipated, the facts of the case perhaps supply the answer. Cammell Laird could reasonably expect that, whatever the state of the test-cock in the inner door of the torpedo tube, the mechanical indicator inside the submarine would ensure that the inner door would never be opened unless the outer bow-cap was closed. Such being so, the only foreseeable consequence of their clogging the test-cock was that the tube might be thought by the crew to be drained of water when in fact it was full, with the consequence that in opening the inner door they and their clothes might be drenched with water. But such a drenching is damage in the eyes of the law, for which an action might lie, and in respect of which a duty of care might well exist. Now if we apply the reasoning of *Re Polemis* to this not unreasonable inference from the facts, since some slight damage to the deceased men could reasonably have been anticipated from the clogging of the test-cock, therefore Cammell Laird's conduct should have been characterised as 'negligent' and they should have been liable for all the direct consequences of that negligence even though they could not have been foreseen. But the House did not pursue this fantastic logic, and the reason why they did not do so is to be found, it is suggested, in the differentiation of interests in respect of which a duty of care is owed. A person's interest in the protection of his clothes is different from his interest in life itself; one may be threatened and the other not. In *Woods* v. *Duncan* the only interest of the deceased men likely to be affected by Cammell Laird's negligence was the former, and they thus could not recover for injuries to the latter.

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[42] At p. 426. The learned Lord however later held that even if Cammell Laird's negligence could be said to have caused the disaster, yet they owed the deceased men no duty of care: see pp. 426–427.

[43] At p. 431.

[44] At pp. 441–442.

[45] At p. 437.

It is submitted therefore that this review of the manner in which the House of Lords have disposed of cases which might have involved remoteness of damage shows that Denning, J., was right in thinking that *Re Polemis* has not survived them. It is further submitted that the rule in *Re Polemis* has escaped overruling, and will perhaps escape that fate for many years yet, solely because the development of the law of negligence in the last twenty years enables the House of Lords to avoid pronouncing on the correctness of the rule by the device of denying that any duty of care is owed in respect of damage which is too remote by the foresight test. Indeed it seems to follow that if the courts restrict duties towards particular persons and particular interests the problem of remoteness of damage will happily disappear from the law. We have already remarked that the courts do in fact dispose of by far the great majority of cases by the simple test of reasonable foresight.

TWO EARLIER AUTHORITIES

In conclusion, it is proposed to consider briefly, in the light of the modern law, the two authorities upon which the Court of Appeal principally relied in *Re Polemis.* There is little doubt that the first of these, the opinions of Kelly, C.B.,[46] Channell, B.,[47] and Blackburn, J.,[48] in *Smith* v. *L. & S. W. Rly.,* would be repudiated by the House of Lords that decided *Bourhill* v. *Young.* The facts of *Smith's Case* were as follows: During a hot and very dry August the servants of the defendant railway company trimmed the grass and hedges bordering the company's line and raked the trimmings into heaps by the side of the line. A spark from a passing engine ignited some of these heaps, and the fire thus started spread rapidly to the hedge bordering the company's land. From there it was carried by a high wind across a field of stubble and across a road until it destroyed the plaintiff's cottage 200 yards from the line. The plaintiff succeeded in his action for damages against the company. The trial judge held that there was evidence of negligence to go to the jury, and the Court of Common Pleas refused to disturb this ruling. The judgment was upheld by the Exchequer Chamber, by the majority of the court on the same grounds as the trial judge and Common Pleas. But the other three members of the court, with whom we are concerned, in dealing with the company's contention that the destruction of the plaintiff's cottage could not reasonably have been foreseen, expressed the view, adopted in *Re Polemis,* that 'what the defendants might reasonably anticipate is . . . only material to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence',[49] and that '. . . when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not'.[50] The three judges are here doing what the Court of Appeal did in *Re Polemis* and the House of Lords repudiated in *Bourhill* v. *Young*, determining the 'legal quality' of an act once for all by foresight of any degree of injury. Even at the time it was decided, there was, as Professors Terry[51] and Goodhart[52] have pointed out, a logical flaw in the reasoning, for unless the company should have foreseen the fire spreading beyond their own hedges it can hardly have been negligent to have started it, since it is not in itself negligent to start a fire on one's own land. The reasoning is moreover in modern eyes open to the more serious objection that the plaintiff's case must rest on the breach of a duty of care owed to him and not to another, and that the company would, on the facts of the *Smith Case,* owe no duty of care to him unless he was within the 'area of potential danger'. If the facts were to come before a modern court, the plaintiff would, on the view of the facts taken by the three judges, find himself in the same position as the claimant in *Bourhill* v. *Young*.

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[46] (1870) L.R. 6 C.P. 14, at p. 20.
[47] At p. 21.
[48] At p. 21.
[49] (1870) L.R. 6 C.P., at p. 21, *per* Blackburn, J.

The second of the authorities on which the Court of Appeal placed great reliance was that passage from Lord Sumner's judgment in *Weld-Blundell* v. *Stephens*[53] in which he expresses his preference for the term 'direct' consequence rather than natural or probable consequence. The House of Lords in that difficult case were faced with the problem whether the defendant was responsible in damages to the plaintiff in the following circumstances. The plaintiff wrote to the defendant a letter defamatory of X. This letter was negligently dropped by the defendant, in breach of an implied contractual duty towards the plaintiff, in the office of P, who maliciously communicated its contents to X. X recovered damages for defamation against the plaintiff, who now sought to recover these damages in turn from the defendant. It was argued on behalf of the plaintiff that the intervention of P, though malicious, was no more than might have been expected in the circumstances, taking account of human nature as it is, and was thus the natural and foreseeable consequence of losing the letter. The plaintiff's claim was rejected, by the majority of the House on the ground that either there was no evidence of 'natural and probable' cause, or that, on the authority of *Ward* v. *Weeks*,[54] there was no liability in tort for damage caused by the unauthorised repetition of defamatory words, whether or not such repetition could have been foreseen. Lord Sumner, however, dealt with the question as involving general principles of remoteness in contract and tort, which he treated as being identical except for the second branch of the rule in *Hadley* v. *Baxendale*.[55] Indeed he cited the well-known passage of Bowen, L.J., in *Cobb* v. *Great Western Rly.*,[56] which is generally thought to be opposed to the *Polemis* rule. 'The damage', said Bowen, L.J.,[57] 'must be such as would flow from the breach of duty in the ordinary and usual course of things. . . . only such damages can be recovered as were immediately and naturally caused by the breach'. The loss suffered by the plaintiff was, in Lord Sumner's opinion, either the result of his own wrong in writing the defamatory letter or was caused by the malicious intervention of P, for which the defendant was not responsible.[58] He thought the intervention of P was too remote a consequence of the defendant's loss of the letter. In his view, 'even though A is in fault, he is not responsible for injury to C which B, a stranger to him, deliberately chooses to do. Though A may have given the occasion for B's mischievous activity, B then becomes a new and independent cause'.[59] It was in rejecting the plaintiff's contention that foreseeable intervention by a third person would not make the damage too remote that Lord Sumner expressed his preference for the term 'direct'. He was concerned in the case before him to find a criterion of remoteness that would confine liability to a narrower field than the test of reasonable foresight, and it was for this reason that he distinguished between culpability and compensation in the following passage: 'What a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence, that is, want of care according to the circumstances. This, however, goes to culpability, not to compensation: *Blyth* v. *Birmingham Waterworks* (1856) 11 Ex. 781;

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[50] At p. 21, *per* Channell, B.
[51] Terry, *Principles of Anglo-American Law,* 1st ed., p. 552.
[52] *Op. cit.,* p. 119.
[53] [1920] A.C. 956.

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[54] (1830) 7 Bing. 211.
[55] (1854) 9 Exch. 341.
[56] (1893) 62 L.J.Q.B. 335.
[57] At p. 337.
[58] At p. 981.
[59] At p. 986.

Smith v. *L. & S. W. Rly.* (1870) L.R. 6 C.P. 14, at p. 21, *per* Blackburn, J. Again, what ordinarily happens, or may reasonably be expected to happen, is material *where a mere series of physical phenomena has to be investigated and the remoteness of the damage or the reverse is to be decided accordingly.* Such a case is *Sharp* v. *Powell* (1872) L.R. 7 C.P. 253, unless indeed it be regarded as a decision on negligence or no negligence'.[60] Thus, though Lord Sumner rejected a general test of reasonable foresight in questions of remoteness, his purpose in doing so was to choose a more restrictive one. And the only sphere in which he allowed the test of foresight to be applicable, that is to say 'where a mere series of physical phenomena has to be investigated', is the very one in which the Court of Appeal in *Re Polemis* refused to apply it; for *Re Polemis* was, *par excellence,* a case involving such a series of physical phenomena. Therefore Lord Sumner's citation of Blackburn, J.'s judgment in *Smith's Case* in support of the distinction between culpability and compensation, when read in the context of the problem before the House and in the light of the remarks which follow, did not imply his approval of any test of remoteness more extensive than that of reasonable foresight. His judgment is, it is submitted, authority against rather than for the *Polemis* decision.[61]

CONCLUSIONS

To conclude, the position may be summarised as follows:—

1. The decision in *Re Polemis,* and the *Smith Case* before it, proceeded upon the reasoning that acts have 'legal quality' without relation to particular persons or particular interests.

2. In the course of refining the concept of negligence, made necessary by the establishment of negligence as a distinct tort, the House of Lords have insisted that negligence be related to the breach of a duty owed to the plaintiff himself, and, so it appears, owed to him in respect of some particular interest.

3. These requirements do, by confining the duty of care to persons and interests likely to be affected by the defendant's acts, virtually nullify the *Polemis* rule. But the courts have been able

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[60] At p. 984. Italics supplied.

[61] Despite Lord Sumner's well-known dictum regarding the effect of a *novus actus interveniens,* the courts have of recent years shown a tendency to apply in such cases the foresight test of remoteness rejected by him: see *Haynes* v. *Harwood* [1935] 1 K.B. 146 and other cases cited earlier.

to avoid having to pronounce upon it by the device of denying a duty of care in respect of injuries too remote by the foresight test. There is no reason why they should not go on doing so. This explains why a rule of such apparent importance, which is generally accepted as correctly stating the law, has had so little effect upon the administration of the law.

4. Of the two principal authorities on which the Court of Appeal relied in *Re Polemis,* the first, the dicta in *Smith* v. *L. & S. W. Rly.,* is in conflict with the modern law, while the second, the opinion of Lord Sumner in *Weld-Blundell* v. *Stephens,* when properly interpreted, provides no support for the Court of Appeal's decision.

5. Should the House of Lords ever find it necessary to pronounce upon the *Polemis* rule, the better view probably is that the House, consonant with recent developments in the law of negligence, would repudiate the rule.

11

HIRE PURCHASE AND THE LAW

E. R. H. Ivamy

Hire Purchase, the medium through which the poor are enabled to partake of the pleasures of the rich, is a potent force in the modern world. Many millions of articles are let out each year on hire purchase terms, and a great mass of case law is to be found on the subject. It is the purpose of this paper to consider certain aspects of this important branch of mercantile law. Its scope is limited to two main topics: (1) the relationship between the owner and the hirer, and (2) the conflict of interests between the owner and third parties.

1. THE RELATIONSHIP BETWEEN THE OWNER AND THE HIRER

It is as yet too early to assess the effect of the Hire Purchase Act, 1938, on the drafting of hire purchase agreements and the relationship between the owner and the hirer, for its effective operation has been masked by the Courts (Emergency Powers) Act until comparatively recently, and many goods are still subject to price controls including rules as to minimum payment and interest rates.[1] Yet it may be confidently asserted that one of the main intentions of the Act—to curb the activities of a small number of hire purchase traders, who had been engaged in sharp practices at the expense of hirers—has been fulfilled.

But certain reforms in the present law governing the relationship might well be considered. The Act of 1938 governs all hire purchase agreements where the total hire purchase price does not exceed £500 in the case of livestock, £50 in the case of railway wagons and motor vehicles, and £100 in the case of any other goods.[2] With the fall in the value of money since 1938, it would seem that a case could well be made out for the raising of these limits especially in relation to motor vehicles.[3]

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[1] A new order by the Board of Trade announced by the Chancellor of the Exchequer in the House of Commons on January 29, 1952, further restricts the terms for the initial deposit and the repayment period in certain hire purchase agreements. See now S.I. Nos. 121 and 122 of 1952.

[2] Section 1.

Under the Act of 1938 a fine of £10 can be imposed on any hirer who fails to inform the owner of the whereabouts of the goods after the receipt of a request in writing to do so.[4] This limit seems to be too low and the Court should be given power to impose a higher fine, say one of £50, in the case of certain more expensive articles let on hire purchase terms. A more important matter is the possibility of the hirer using a hired motor vehicle for the purpose of smuggling, *e.g.*, by hiding undeclared watches in the petrol tank. In case of detection the vehicle can be seized by the Customs Authorities and all the rights of the real owner are extinguished even though he is innocent.[5] All he can do is to appeal to the Commissioners of Customs and Excise, who have a complete discretion as to whether they return the vehicle.[6] A case could be made out for an amendment of the law whereby the vehicle should be returned in any event, where no guilty knowledge exists.

All hire purchase agreements in practice are in writing, and 'standard' forms are used, and it is essential to look at the exact words of the contract. The usual clauses deal, *inter alia,* with the payment of the hire rent and purchase price, the liability for repair, the duty to surrender the goods, insurance and the right to terminate.

These matters, however, are outside the scope of this paper and it is proposed to limit the discussion to the problems of conditions and warranties.

If the agreement is within the limits of the Hire Purchase Act, 1938, there is an implied condition by section 8 (1) (*b*) that the owner shall have a right to sell the goods at the time when the property is to pass, *i.e.,* when the final payment is made. This condition cannot be excluded by any agreement to the contrary.

As to agreements outside the 1938 Act, passages in the judgments of the Court of Appeal in *Felston Tile Co., Ltd.* v. *Winget*[7] lend support to the view that the similar condition in the Sale of Goods Act, 1893, s. 12 (1) is also to be implied in hire purchase agreements on the ground that an option to buy in the agreement amounts to a conditional agreement for sale within section 1 of the Act of 1893. It is possible that these passages should be regarded as *obiter*,[8] but the decision is open to the objection that although there must be a 'seller' as defined by section 62 (1) there must also be a 'buyer' and a 'buyer' means 'a person who buys or agrees to buy', and under the usual hire purchase agreement the hirer has not bought or agreed to buy, even conditionally.[9]

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[3] See Written Answers to Questions—House of Commons, January 30, 1951, and December 4, 1951.

[4] Section 7.

[5] Customs Consolidation Act, 1876, s. 202. For a recent case in which a taxi-cab was seized and the innocent owner had to pay £250, see 'Power of Seizure by Customs', *The Times,* February 14, 1952, p. 3. See also *De Keyser* v. *British Railway Traffic and Electric Co., Ltd.* [1936] 1 K.B. 224 (forfeiture of motor tank wagon).

[6] *Ibid.,* s. 209.

But is there an implied condition that the owner has a good title at the time of the bailment? It might be argued that, since the Act of 1938 refers only to title at the time of the passing of the property, no title need be held at the earlier time, on the principle of *expressio unius exclusio alterius*.[10]

In *Karflex Ltd.* v. *Poole*[11] there is a *dictum* by Goddard, J. (as he then was), who observed that where a person is letting out chattels of any description, he impliedly contracts that he is the owner of the property at the time when he lets it out. But the *ratio decidendi* of the case was that on the true construction of the agreement there was an *express* condition that the owner had a good title at the time of the bailment, for he reserved the right during the agreement to place his name plate on the car in question and the deposit was stated to be 'in consideration of the option of purchase hereinafter contained'.

The common practice is for the hire purchase agreement to exclude all conditions whether at common law or by statute. It is still open to question whether any clause could be drafted so as to exclude any implication that the title was good at the time of the bailment. Possibly the option of purchase would have to state expressly that the hirer must take such title as the owner had.

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[7] [1936] 3 All E.R. 473, at pp. 478, 480.

[8] For a consideration of this case, see *The County Court Practice 1951*, pp. 1226–1227.

[9] See *Helby* v. *Matthews* [1895] A.C. 471; *Belsize Motor Co.* v. *Cox* [1914] 1 K.B. 244; and for the general importance of the distinction between sale and hire purchase, see E. R. Hardy Ivamy, 'Conversion by Innocent Agents' (1951) 18 *The Solicitor*, pp. 125–128.

[10] For this maxim generally, see Sir Roland Burrows, *Interpretation of Documents*, 2nd ed., 1946, p. 78.

[11] [1933] 2 K.B. 251, at pp. 263–265. See also *Mercantile Union Guarantee Corporation* v. *Wheatley* [1938] 1 K.B. 490, at p. 497, *per* Goddard, J.; *Warman* v. *Southern Counties Car Finance Corporation Ltd.* (*W. J. Ameris Car Sales, Third Party*) [1949] 2 K.B. 576.

Suppose, however, that the owner had no title when the property was to pass. Can he compel the hirer to pay all sums due by way of hire? It was decided in the recent case of *Warman* v. *Southern Counties Car Finance Corporation Ltd.* (*W. J. Ameris Car Sales Third Party*)[12] that no rent was payable on the ground that if at any stage the option to purchase goes the whole value of the agreement to the hirer has gone with it. If he wanted to make an agreement merely to hire a car, he would do so, but he enters into a hire purchase agreement because he wants to have the right to purchase the car, and that is the foundation of the contract.

But it cannot be said that the hirer paid his money solely to obtain the property, and there does not seem to be a *total* failure of consideration if the title of the owner proved defective, and it would seem fair that he should be required to make a reasonable allowance for the use of the article, except when the owner was fraudulent or knew he had no title. As against this argument, however, the hirer would really be called upon to pay money to the 'owners' for the hire of property which was not theirs.[13]

For agreements under the Act of 1938 there are certain warranties and conditions that by section 8 cannot be excluded by agreement, *e.g.*, a warranty that the hirer shall have and enjoy quiet possession of goods, or that the property shall be free from any charge or encumbrance in favour of any third party at the time when the property is to pass, or that new goods are of merchantable quality.[14] But agreements may be made that goods need not be reasonably fit for the purposes for which the owner expressly or impliedly knows the hirer wants them, if the provision is proved to have been brought to the hirer's notice.

In view of the fact that the words in the judgments in *Felston Tile Co., Ltd.* v. *Winget*[15] may possibly be regarded as

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[12] [1949] 2 K.B. 576. Cf. the corresponding position in a case of a sale, *Rowland* v. *Divall* [1923] 2 K.B. 500.

[13] As was pointed out by Finnemore, J., [1949] 2 K.B., at p. 583. This point had been left open by the Court in *Karflex Ltd.* v. *Poole* (*supra*).

[14] But see proviso to s. 8 (3) (*d*).

[15] Above, p. 210.

obiter, it would still appear to be prudent to exclude all statutory and other warranties except as provided by the present section. Whether these have been completely excluded is a question of law in each case.[16]

WHEN HIRE PURCHASE TRANSACTIONS ARE REALLY BILLS OF SALE

At the present time a large proportion of hire purchase transactions are arranged by finance companies. The system of hire purchase finance has been evolved as a result of the desire of people who cannot afford to pay for them in a lump sum to buy, *e.g.*, motor cars, refrigerators, vacuum cleaners or other household equipment from dealers who cannot afford to wait for their money. The form of the agreement naturally varies but the most usual method is for the customer to approach the dealer who stocks the article which he wants. The dealer informs the finance company that he has a suitable client and encloses references and a request by the customer that he would like to have the article on hire purchase terms. The finance company checks the references and if they are satisfactory buys the article from the dealer. The article is then let out under the hire purchase agreement which the customer enters into directly with the company.[17]

In this form of transaction it is clear that the property in the article is in the finance company and it is the possession only which is passed to the customer until he exercises his option to purchase. In this case therefore there can be no question of registration under the Bills of Sale Acts, 1878 and 1882,[18] and the right to retake possession usually reserved to the owner in hire purchase agreements is not a licence given to him to take possession of chattels as security for a debt within the meaning of these statutes.[19]

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[16] *Wallis, Son & Wells* v. *Pratt & Haynes* [1911] A.C. 394; *Baldry* v. *Marshall* [1925] 1 K.B. 260; *Andrews Brothers (Bournemouth) Ltd.* v. *Singer & Co., Ltd.* [1934] 1 K.B. 17; *L'Estrange* v. *Graucob* [1934] 2 K.B. 394; *Webster* v. *Higgin* [1948] 2 All E.R. 127.

[17] See E. R. Hardy Ivamy, 'Warranties by Third Parties' (1951) 18 *The Solicitor*, pp. 222–224; *Polsky* v. *S. & A. Services* [1951] 1 All E.R. 185, at p. 186; *Menzies* v. *United Finance Corporation Ltd.* [1940] 1 All E.R. 549, at p. 551.

[18] By section 4 of the Act of 1878 a bill of sale shall include 'bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon shall be conferred'.

It might be thought that every finance company, as the name implies, which provides the necessary money for the transaction is automatically making a loan to the hirer, but this is not so, as long as there has been a bona fide purchase of the article from the dealer followed by a bona fide hiring to the hirer. But it sometimes happens that the hirer pleads that a document, which purports to be a hire purchase agreement, is really a cloak for securing a loan, in that it is he who has paid the money to the dealer, and that the necessary money, in part or in whole, has been lent to him by the company with a clause in the agreement that failure to repay the sum lent will involve the seizure of the article. In such a case the agreement would be void under these Acts for lack of registration,[20] since the ordinary hire purchase agreement cannot be adapted to the form set out in the Schedule to the Act of 1882. The problem therefore which the Court has to decide is whether the transaction in question is a genuine sale by the original owner of the chattel to the person who is finding the money, and a genuine reletting to the original owner on hire purchase terms, or whether the transaction though taking that form is nothing more than a loan of money on the security of goods. It is perfectly clear from the judgment of Lord Esher, M.R., in *Re Watson, Ex parte Official Receiver in Bankruptcy*[21] and in *Madell* v. *Thomas & Co.*[22] that this is the question which has to be determined. The Court is not to look merely at the documents. It must discover what the real transaction was. 'The Court is to look through or behind the documents and to get at the reality; and if in reality the documents are only given as a security for money, then they are bills of sale'.[23] The question indeed is simply one of fact.[24] Yet it may be instructive to consider what circumstances the courts have taken into account in the reported cases, and the principles which can be deduced from them.

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[19] *Ex p. Crawcour, In re Robertson* (1878) 9 Ch.D. 419, at p. 423; *United Forty Pound Loan Club* v. *Bexton* [1891] 1 Q.B. 28.

[20] Under section 9 of the Act of 1882.

[21] (1890) 25 Q.B.D. 27.

[22] [1891] 1 Q.B. 230.

[23] *Ibid.*, at p. 234.

[24] *Victoria Dairy Co.* v. *West* (1895) 11 T.L.R. 233.

In cases where the hirer has actually agreed to buy the article before he sees the finance company, the Court may well come to the conclusion that the transaction is one of loan because the property will already have passed to the hirer under the Sale of Goods Act, 1893, s. 17, unless a contrary intention appears.[25] The usual form of application therefore to the finance company contains an express statement by the applicant that he has no interest or property in the article to be purchased. The hire purchase transaction between the hirer and the company will not necessarily be void under the Bills of Sale Acts if it is signed at the same time as the agreement with the dealer. Further elements to be considered are the fact that the hire purchase agreement was signed prior to the purchase by the company, for people often agree to sell or let something which at the moment of agreeing they do not possess but which they know they can obtain before they must deliver to the other party, and the fact that all arrangements were made between hirer and the dealer who was the company's agent in arranging the hire purchase terms.[26] A material consideration may be whether there has been any discussion as to the value of the article between its owner and its alleged purchaser. Similarly, the Court may take into account the fact that the dealer is required to guarantee the due performance of the agreement by the hirer and agrees to repurchase the article for the amount outstanding if he defaults.[27] In the recent case of *Polsky* v. *S. & A. Services*, Goddard, L.C.J.,[28] observed: 'It seems to me that one of the most satisfactory ways of deciding what the true nature of the transaction was is to see whether the documents set out the deal between the parties as it took place, or whether the facts, or some of them, therein recorded do not represent that which happened, but give the transaction what I may call an innocent appearance'.[29] Applying this test to the alleged hire purchase agreement of a motor car he found it was really a bill of sale. He said that the transaction started with a proposal which, as filled in, would be completely appropriate to the class of transaction whereby the finance company buys from a dealer, while at the same time part of the purchase price is provided by the prospective buyer. It stated that an initial cash payment of £495 had been made, but no such payment had ever taken place. It showed a balance on the purchase price of £400. The £400 had in fact been found by the finance company and handed straight to the alleged hirer, and was not a sum of money found by them to pay to the original owner of the car. It was a sum of money paid to the alleged hirer who desired to put his bank account into credit, so that the cheque he had given might not be dishonoured or his account put into overdraft.

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[25] *Colchester Motor Purchase Co.* v. *Stewart* (1924); Jones and Proudfoot, *Notes on Hire Purchase Law*, 2nd ed., p. 75.

[26] *Colchester Motor Hire Purchase Co., Ltd.* v. *Wragge* (1923); *ibid.*, p. 90.

[27] *Automobile & General Finance Corporation Ltd.* v. *Morris* (1929) 73 S.J. 451; *In re George Inglefield & Co., Ltd.* [1933] Ch. 1; *In re Lovegrove* [1935] Ch. 464. See also E. R. Hardy Ivamy 'Guarantors of Hire Purchase Agreements' (1952) 19 *The Solicitor*, p. 7.

[28] [1951] 1 All E.R. 185.

[29] *Ibid.*, at p. 189.

An immaterial element is the fact that the intention of the parties is to carry out their transaction in such a way as to escape the provisions of the Bills of Sale Acts, for as Lindley, L.J., said: 'In one sense you cannot evade an Act of Parliament; that is to say the Court is bound to construe every Act of Parliament as to take care that that which is really prohibited may be held void. On the other hand you may avoid doing that which is prohibited by the Act of Parliament, and you may do something equally advantageous to you which is not prohibited by the Act of Parliament'.[30]

WHEN HIRE PURCHASE AGREEMENTS ARE MONEYLENDING TRANSACTIONS

Giving judgment in *Transport & General Credit Corporation Ltd.* v. *Morgan,* Simonds, J. (as he then was), observed[31]: 'It must be remembered that hire purchase agreements now take a very large part in the commercial and social life of the community and the financing of them is an enormous business in the City of London and elsewhere. It appears to me that the financiers and the dealers co-operate in the common venture of making the whole business of hire purchase agreements which is now, for good or for evil, a necessary part of our social life, feasible, and to regard one party to that common venture which is now a recognised mercantile service, as carrying on the business of a moneylender is an abuse of language'.

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[30] *Yorkshire Railway Wagon Co.* v. *Machine* (1882) 21 Ch.D. 309, at p. 318; *Redhead* v. *Westwood* (1888) 59 L.T. 293; *In re Watson* (1890) 25 Q.B.D. 27, at p. 37; *Colchester Motor Hire Purchase Co.* v. *Wragge* (*supra*).

[31] [1939] Ch. 531, at p. 551.

If the hirer desires to escape liability under the hire purchase agreement by pleading the Moneylenders Acts, he must prove[32] that the substance of the transaction was moneylending, that the owner was a moneylender within the meaning of the Acts, and that the provisions of the Acts have not been satisfied, *e.g.*, that the moneylender was not licensed, or that no note or memorandum of the contract was made to satisfy section 6[33] of the Moneylenders Act, 1927. The obvious advantages in pleading the Moneylenders Acts are that the rights of the lender of the money over the chattels comprised in the agreement are unenforceable, and the hirer can avoid liability for the repayment of money lent, whereas under the Bills of Sale Acts he may be liable to repay the money with reasonable interest in an action for money had and received.

There appears to be no reported case in which a finance company has been held to be a 'moneylender'.[34] Although moneylending may be the object and the intention for which finance companies exist the question is not with what object they employ their money, but the method they have of employing it. If the method employed constitutes a sale, then the transaction is not only the lending of the money but also a purchase of the goods, even although it is for the purpose of lending money that it is being done in that way.[35]

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[32] For precedents, see *The Encyclopædia of Court Forms and Precedents in Civil Proceedings*, 1948, Vol. 11.

[33] 'The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and either the interest charged on the loan expressed in terms of a rate per cent per annum, or the rate per cent per annum represented by the interest charged as calculated in accordance with the provisions of the 1st Schedule to this Act'.

[34] Cases in which the allegation of moneylending has failed include: *Automobile & General Finance Corporation Ltd.* v. *Morris* (1929), *The Times* newspaper, June 19; *Olds Discount Ltd.* v. *Cohen* [1938] 3 All E.R. 281; *Olds Discount Ltd.* v. *John Playfair Ltd.* [1938] 3 All E.R. 275; *King* v. *Chester & Cole Ltd.* (1928); Jones and Proudfoot, *Notes on Hire Purchase Law*, 2nd ed., p. 102.

[35] See *Olds Discount Co. Ltd.* v. *Cohen* [1938] 3 All E.R. 281, *per* Porter, J.

2. THE CONFLICT OF INTERESTS BETWEEN THE OWNER AND THIRD PARTIES

LIENS

The first type of lien that we shall consider is the Repairer's Lien, with special reference to motor cars. The general rule can be found stated by Best, C.J., in *Bevan* v. *Waters*[36] where he says: 'For I take it to be a common law principle that if a man has an article delivered to him on the improvement of which he has to bestow trouble and expense he has a right to detain it until his demand is paid'. Mere *maintenance* is not sufficient, so that no lien can be created by washing a car or supplying it with oil and petrol.[37] The only circumstance in which there can be a conflict of interest between the owner and the garage proprietor is when the vehicle has been repaired, and the problem of the Court is to balance these competing claims.

If there is an express term in the hire purchase agreement that the hirer is to keep the car in good repair, the garage proprietor clearly has a valid lien.[38] But even if there is no such express term the result will be the same, for as Scrutton, L.J., said: 'the hirer of a chattel is entitled to have it repaired so as to enable him to use it in the way in which such a chattel is ordinarily used. The hirer was therefore entitled without any express authority from the owner to have the motor car repaired so as to enable him to use it as a motor car is ordinarily used'.[39] The knowledge of the garage proprietor that the car is subject to a hire purchase agreement is immaterial.[40]

In many hire purchase agreements a clause is included whereby the hirer is forbidden to create any lien for repairs. The lien will not be affected, because a contractual limit of authority not communicated to the repairer does not limit the implied authority derived from the hirer being allowed to possess and use the car. If a man is put in a position which holds him out as having a certain authority, people who act on that holding out are not affected by a secret limitation of the apparent authority.[41] If the hired vehicle is a taxi-cab which is always kept at the same garage where the repairs are likely to be done, the owner can easily protect himself by requiring information as to the garage where the taxi-cab is kept, and notifying the garage owner that the hirer has no power to create a lien for repairs. Express notice of the limitation of authority is essential and this rule reflects hardly on the owners of hired out private cars, which are likely to be repaired anywhere, and where it would be impossible to notify every garage in the country. One possible remedy would be legislation to the effect that a notice in the appropriate trade papers should be conclusive, whether the particular garage proprietor had read the notice or not. Another would be the institution of a custom whereby a distinguishing mark[42] placed on some prominent feature of the vehicle should be conclusive evidence of such limitation of authority, assuming that the mark was present when the order for repairs was given by the hirer. But would any garage proprietor ever be willing to repair cars?

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[36] (1828) 3 C. & P. 518, at p. 523. See also *Bleaden* v. *Hancock* (1829) 4 C. & P. 152, at 156. For the general history of liens, see Holdsworth, *History of English Law*, Vol. 7, p. 512.

[37] *Hatton* v. *Car Maintenance Co., Ltd.* [1915] 1 Ch. 621; *Chester & Cole Ltd.* v. *Gordon Transport Co., Ltd.*; (1927) Jones and Proudfoot, *Notes on Hire Purchase Law*, 2nd ed., p. 58.

[38] *Green* v. *All Motors Ltd.* [1917] 1 K.B. 625.

[39] *Ibid.*, at p. 633.

[40] *Ibid.*

The law thus favours the claims of the garage proprietor on the paramount principle of apparent authority. But the balance is restored in favour of the owner, if it can be proved that at the time the repairs were ordered the consent of the owner to possession by the hirer had been withdrawn. This of course is a question of fact in each case.[43] Nevertheless, if the hire purchase agreement contained a clause that if the hirer delivered the car to a person for repair, the agreement should automatically be determined, it would seem that even if the garage proprietor knows nothing of this clause he would lose his lien. The garage proprietor when asked to undertake a major repair should find out the exact terms of the hiring, for as the law stands at present he acts at his own risk.

The second type of lien is that of a person who is under a legal duty to receive chattels, *e.g.*, a common carrier or an innkeeper. Here the law solves the problem of the competing interest in favour of such person even though he knew that the goods were not the property of the person from whom he received them, and even though the hire purchase agreement has been determined before the goods were received. This seems an eminently fair solution though it is qualified by the principle that if the carrier or innkeeper knew that the goods were not the property of the hirer and that in keeping the goods he was a wrongdoer, no lien will attach.[44]

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[41] *Albermarle Supply Co.* v. *Hind & Co.* [1928] 1 K.B. 307 (Court of Appeal).

[42] See below under 'Innocent Purchasers'.

[43] *Bowmaker Ltd.* v. *Wycombe Motors Ltd.* [1946] 1 K.B. 505 (Court of Appeal). If before the repairs are completed the owner finds out that the car is being repaired and tells the garage proprietor not to continue them, the latter would probably have no lien for the full repairs but only for those he had already done. See *Green* v. *All Motors Ltd.* [1917] 1 K.B. 625, at p. 633; *Lilley* v. *Barnsley* (1844) 1 Car. & K. 344.

FIXTURES [45]

An owner letting out chattels may sometimes find that if the hire purchaser fails to pay the hire-rent or to exercise his option to purchase, all rights of recovery of the property will be lost. This position arises when the chattels become 'fixtures' so that all rights in them are vested in the hirer's landlord or mortgagee as the case may be. Whether a particular chattel has become a fixture depends upon two factors: (1) the degree of 'annexation', and (2) the object of annexation. The mere fact that an article is subject to a hire purchase agreement cannot be taken into consideration to show that there was no intention to cause the chattel to become a fixture.[46]

If the chattel is annexed for the more complete enjoyment of the land the chattel becomes a fixture. But if the chattel is annexed for a merely temporary purpose or for the more complete enjoyment of the chattel, it cannot be regarded as a fixture.[47] But these principles seem difficult to apply in the case of machinery which is fixed to the floor in order to steady it, for it could be said that the purpose of the annexation was the more complete enjoyment of the machinery, or on the contrary that the annexation was to improve the usefulness of the premises.[48] Each case must depend on its own facts and it is difficult to lay down a general rule.[49]

[44] *Johnson* v. *Hill* (1822) 3 Stark 172; *Broadwood* v. *Granara* (1854) 10 Ex. 417.

[45] For 'fixtures' generally, see Adkin, *The Law relating to Fixtures,* 1947.

[46] *Hobson* v. *Gorringe* [1897] 1 Ch. 182.

[47] *Leigh* v. *Taylor* [1902] A.C. 157.

[48] *Mather* v. *Fraser* (1856) 2 K. & J. 536; *Hobson* v. *Gorringe* [1897] 1 Ch. 182; *Reynolds* v. *Ashby* [1904] A.C. 466.

[49] *Lyon* v. *London City & Midland Bank* [1903] 2 K.B. 135; *Vaudeville Electric Cinema Ltd.* v. *Muriset* [1923] 2 Ch. 74.

If there is no actual annexation, *e.g.*, in the case of an article resting on its own weight, the burden of proof lies on the person, who alleges that it is a fixture.[50] On the other hand, if there is even a slight degree of annexation, the onus lies on the person who asserts that it is a chattel.[51]

The position is clearly different in the case of a landlord and tenant on the one hand, and a mortgagor and mortgagee on the other. For the hirer does not usually wish to benefit his landlord, whereas he may well wish to benefit the land, subject to raising money on it by way of mortgage. In each case the rights of the real owner will be affected.

(1) *Landlord and Tenant*

Even though an article has become a fixture, it may yet come within certain classes of fixtures which are removable by the tenant provided there are no clauses to the contrary in his lease,[52] and the true owner may call upon the hirer to exercise his rights. These classes are fixtures erected for trade purposes,[53] ornamental and domestic fixtures,[54] and agricultural fixtures.[55]

Except in the case of agricultural fixtures, the articles must be removed during the currency of the tenancy. If the tenant has surrendered the lease the owner has a reasonable time in which to recover his property,[56] but if the lease has been forfeited then it is doubtful whether the owner can claim them unless actual severance has taken place,[57] or he has claimed them prior to a date from which the forfeiture operates.[58]

The problem therefore arises as to the steps which the owner should take to protect his interests. Two courses are open to him. First to arrange for the landlord to concur in the hire purchase agreement, or secondly to make a separate contract so that the

[50] *Pole Carew* v. *Western Counties Manure Co.* [1920] 2 Ch. 97.

[51] *Holland* v. *Hodgson* (1866) L.R. 7 C.P. 328.

[52] *Lambourn* v. *McLellan* [1903] 2 Ch. 268; *In re British Red Ash Collieries Ltd.* [1920] 1 Ch. 326; *Slough Picture Hall* v. *Wade* (1916) 32 T.L.R. 542.

[53] *Poole's Case* (1703) 1 Salk. 368; *Smith* v. *City Petroleum Co.* [1940] 1 All E.R. 260.

[54] *Leigh* v. *Taylor* [1902] A.C. 157; *Spyer* v. *Phillipson* [1931] 2 Ch. 183.

[55] Agricultural Holdings Act, 1948, s. 13 (1), and for rules relating to notice of removal, see *ibid.*, s. 13 (2) (3).

[56] *Weeton* v. *Woodcock* (1840) 7 M. & W. 14.

[57] *British Economical Lamp Co.* v. *Empire Mile End* (1913) 29 T.L.R. 386.

[58] *Elliott* v. *Boynton* [1924] 1 Ch. 236.

fixture may be severed within a reasonable time after default on the part of the hirer.

(2) *Mortgagor and Mortgagee*

The question we must now consider is the right of the true owner to recover possession of the hired chattels when the hirer's premises are subject to a mortgage. In general one can say that the chattels on becoming fixtures pass absolutely to the mortgagee.[59] But the courts have evolved different rules if the mortgagor is a trader and the chattels have been supplied to him for the purpose of his trade or business. Here the question depends upon whether the mortgage is legal or equitable and whether or not the mortgage preceded the hire purchase agreement.

If a legal mortgage is executed before the hire purchase agreement it is presumed that the hirer has an implied licence to affix articles to be used in his trade, and therefore the owner has a right to enter and remove them if the hirer defaults in payment.[60] But this implied authority is excluded if there is an express provision to the contrary in the mortgage deed,[61] or if the mortgagee takes possession before their removal.[62]

On the other hand if the hire purchase agreement is concluded before the execution of the mortgage, the mortgagee will take subject to the rights of the owner only if he had notice of the agreement.[63] The mortgagee is not bound to make any special inquiry in relation to fixtures, and is not deemed to have notice merely because the articles have a name plate giving the name of the owner on them, unless it can be proved that he knew or saw it when the mortgage was executed.[64]

If the mortgage was an equitable one the owner's rights will depend upon the maxim *Qui prior est tempore potior est jure*, and the question of notice is immaterial.[65]

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[59] *Meux* v. *Jacobs* (1875) L.R. 7 H.L. 481; *Mather* v. *Frazer* (1856) 2 K. & J. 536; *Longbottom* v. *Berry* (1869) L.R. 5 Q.B. 123.

[60] *In re Maryport Hematite Iron & Steel Company* [1892] 1 Ch. 415.

[61] *Ellis* v. *Glover* [1908] 1 K.B. 388.

[62] *Hobson* v. *Gorringe* [1897] 1 Ch. 182; *Reynolds* v. *Ashby* [1904] A.C. 466.

[63] *Hobson* v. *Gorringe* (*supra*).

[64] *Ibid.*

[65] *Re Samuel Allen & Sons Ltd.* [1907] 1 Ch. 575; *Re Morrison, Jones & Taylor, Ltd.* [1914] 1 Ch. 50; see further, H. A. Holland, 'Equitable Liens under Hire Purchase Agreements' (1928) 3 *Cambridge Law Journal*, p. 173; *Hamer* v. *London City & Midland Bank Ltd.* (1918) 118 L.T. 571.

The problem therefore is 'what steps can the owner take to protect his property?' It is advisable for the agreement to contain a clause that the articles are hired on the representation that the land on which they are to be installed is not mortgaged; and if this were untrue the hirer could be sued for fraudulent misrepresentation. The hirer should be forbidden by the terms of the agreement to mortgage his property without consent, and be required to give reasonable notice of any proposed intention to mortgage, so that if the mortgage was executed the owner would have time to give notice of his interest to the mortgagee, and if the mortgage was not executed he could retake possession of the goods for breach of a condition of the agreement. But the mortgagee might still get priority if the hirer did not communicate with the owner, and there seems no method of avoiding this result. If a mortgage had been created before the goods are hired, the mortgagee should be asked to enter into an agreement with the owner so that his right to enter and retake the property would be safeguarded in the event of the hirer's default. Appropriate steps should be taken to give notice to all subsequent purchasers from the mortgagee.

DISTRESS

When goods are let out under hire purchase agreements one considerable danger has to be faced by their owner. If the goods are hired by a tenant whose rent is in arrears, the landlord may levy a distress, and the problem we have to consider is how the owner can avoid losing his property.

The ideal solution is for him to get the landlord to sign a binding agreement undertaking that the goods placed on the premises shall not be liable to distress, but this is not always possible.

The Law of Distress Amendment Act, 1908, s. 1, states that protection from distress can be afforded to certain under-tenants, lodgers, or other persons not being tenants of the premises and not having any beneficial interest in the premises, provided that the necessary formalities laid down by the Act are observed. But the Act then goes on to say that protection cannot be obtained for goods comprised in 'any bill of sale, hire purchase agreement or settlement made by such tenant'.[66]

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[66] Section 4 (2).

But what is the interpretation of this section? Are the owners of hire purchase goods still protected by the Act? In *Rogers* v. *Martin*[67] Alverstone, L.C.J., observed[68]: 'the only reasonable meaning of that subsection is that goods are not to get the benefit of section 1 if they are goods as to which the tenant himself has made an arrangement by which he had sought to secure *for his own goods* the protection intended by the Act to be given to the goods of other persons only'. To put the matter in another way, the words 'made by such tenant' are to be read not as confined to the previous word 'settlement', but as extending to the other words 'bill of sale' and 'hire purchase agreement'. In the case of a bill of sale or settlement, the tenant would clearly be the grantor, and the words 'hire purchase agreement' must mean a hire purchase agreement in which the tenant is the grantor and not the grantee.

But a different view was expressed by Darling, J., in the earlier case of *Shenstone & Co.* v. *Freeman*[69] who said that the words 'goods comprised in any hire purchase agreement' mean any hire purchase agreement to which the tenant is a party, and later cases appear to have confirmed this view though the point is still open in the Court of Appeal if taken in the court of trial.[70] The question therefore is 'when are goods comprised in a hire purchase agreement?'

It has been held that goods are so comprised when there is still some subsisting contractual obligation under the agreement relating to them, that is to say when a right remains in respect of the goods themselves to establish which recourse may be had to the agreement. Thus in one case goods were held to be comprised in an agreement which provided that if the articles should be seized under a distress, the owners without formal demand should be entitled to resume possession and power to enter and retake was given to them, for the owners could not recover the goods without showing their title to do so under the agreement.[71] A new form of agreement was introduced by *Smart Bros.* v.

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[67] [1911] 1 K.B. 19; 80 L.J.K.B. 208.

[68] *Ibid.*, at p. 212; see also the judgment of Buckley, L.J., at p. 213.

[69] [1910] 2 K.B. 84, at p. 90; but see the judgment of Bucknill, J., at p. 93.

[70] *Jay's Furnishing Co.* v. *Brand & Co.* [1915] 1 K.B. 458 (Court of Appeal), at p. 463.

[71] *Hackney Furnishing Co.* v. *Watts* [1912] 3 K.B. 255, D.C. See also *Jay's Furnishing Co.* v. *Brand & Co.* [1915] 1 K.B. 458 (Court of Appeal).

Holt[72] which contained a clause that a written notice should for all purposes absolutely determine the agreement and hiring and thereupon neither party should have any rights thereunder, and it was held that the effect was that the goods were no longer comprised in the agreement, for the owners could recover the goods under their common law rights without resorting to the agreement at all. Similarly a clause may be included in the agreement whereby all rights are determined as soon as notice to this effect is delivered to the Post Office for transmission to the hirer, and this will have the same result.[73]

As regards hire purchase agreements within the limits of section 1 of the Hire Purchase Act, 1938, such clauses are no longer necessary, for section 16 (2) provides that the goods will not be comprised in the hire purchase agreement, if the agreement has been determined, or if the owner having a right to recover the goods has commenced an action to enforce that right, even though the Court in any such action postpones the operation of an order for the specific delivery of the goods to the owner.[74]

But though the owner can protect himself from the danger of the goods being held to be comprised in a hire purchase agreement, he is still faced with the danger of the goods being held to be in the possession, order or disposition of such tenant by the consent and permission of the true owner, under such circumstances that such tenant is the reputed owner thereof.[75] As soon as the owner hears that a distress is likely he should inform the landlord that his consent is determined, for the fact that the agreement contains an 'automatic cesser' clause is not sufficient to oust the presumption of reputed ownership.[76] In the absence of express notice, the only possible method of solving the problem is for the owner to establish successfully a trade custom that the goods in question are never deemed to be in the reputed ownership of the tenant, but at present the attitude of the courts appears unfavourable to such a possibility.[77] In the case of agreements under the Hire Purchase Act, 1938, it should be observed that a postponement order takes the goods out of the reputed ownership of the tenant.[78]

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[72] [1929] 2 K.B. 303.

[73] *Drages Ltd.* v. *Owen* (1935) 52 T.L.R. 108. See also *Times Furnishing Co., Ltd.* v. *Hutchings* [1938] 1 K.B. 775.

[74] For postponement orders generally, see ss. 12, 13 and 14.

[75] Law of Distress Amendment Act, 1908, s. 4 (3).

[76] *Times Furnishing Co., Ltd.* v. *Hutchings* [1938] 1 K.B. 775.

[77] See the corresponding position in bankruptcy, though the reputed ownership section is limited to goods in the possession, order or disposition of the bankrupt in his trade or business, Bankruptcy Act, 1914,

INNOCENT PURCHASERS

If a hirer sells the article which is the subject of the hire purchase agreement to a third party,[79] no title will pass unless the sale took place in market overt.[80]

In some recent cases[81] there has been disclosed the great danger to the public incidental to the hire purchase system with reference to motor cars. The appearance of a mere hire purchaser as the real owner of a car exposes an innocent but foolish buyer to a grave risk, as also possibly a series of such buyers. As we shall see, the number of cars which have been sold in breach of hire purchase agreements raises the question whether some action is necessary to safeguard purchasers in these transactions.

One suggestion that has been put forward[82] is that motor cars should be bound to be marked externally in some suitable way as being subject to hire purchase agreements. This would certainly render the activities of a feloniously minded hirer more difficult and would facilitate prosecutions of such persons, as all that need be proved would be that they had moved the statutory form of marking. But this would not really help the innocent purchaser, for a touch of paint can hide a multitude of sins.[83] Further, would people like their neighbours to know that their cars were only on hire purchase?

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s. 38. *In re Ford* [1929] 1 Ch. 134; *Re Fowler, ex p. Brooks* (1883) 23 Ch.D. 261; *Chappell* v. *Harrison* (1910) 103 L.T. 594, and see generally Ringwood, *Principles of Bankruptcy,* 1947, pp. 73–78; Williams, *Law and Practice in Bankruptcy,* 1949, pp. 311–326.

[78] Section 16 (1).

[79] *Helby* v. *Matthews* [1895] A.C. 471. Cf. *Lee* v. *Butler* [1893] 2 Q.B. 318; see also E. R. Hardy Ivamy, 'Conversion by Innocent Agents' (1951) 18 *The Solicitor,* p. 125; *Robin and Rambler Coaches* v. *Turner* [1947] 2 All E.R. 284.

[80] Benjamin, *Sale,* 1950, pp. 17–30; note in (1949) 12 *Modern Law Review,* p. 371 (L. C. B. Gower).

[81] *Norman* v. *Pitt* (1948) 92 S.J. 514; *Western Credit Services Ltd.* v. *Pascoe* (1950) 94 S.J. 581; *Bishopsgate Finance Corporation Ltd.* v. *Transport Brakes Ltd.–Winsor Garage, Third Party* [1949] 1 K.B. 322, at p. 338; *R.* v. *Thomas* (1949) C.L.Y. 1736.

[82] *Western Credit Services Ltd.* v. *Pascoe* (*supra*).

[83] See also (1950) 94 S.J. 480.

The present type of registration book is valueless to an innocent purchaser where the hirer attempts to dispose of the car fraudulently, because it merely states the name of the 'owner' of the vehicle, and the word 'owner' for the purpose of the licensing regulations merely means 'the person by whom the vehicle is kept and used'.[84] The Minister of Transport was asked in 1948[85] whether he would introduce legislation that when a motor vehicle was subject to a hire purchase agreement the interest of the real owner should be recorded in the registration book, but he said he was not prepared to do so on the ground that the registration book was not a document of title and could not provide a record of legal ownership, and it would lead to a very considerable difficulty on the part of the licensing authorities. The name of the real owner in the registration book would not of itself be sufficient, for forgery is always possible.[86] Duplicate records would have to be kept by the licensing authorities and a system of indexes provided.[87] It might be questioned whether in the absence of some central register the local licensing authorities could devise any machinery capable of providing the speedy, accurate and up to date information required.

Any insurance policy relating to the vehicle is likely to bear an endorsement of a hire purchase interest, for it is the custom of hire purchase companies to give notice to insurers of their contract with the ostensible owner. An examination of the policy itself, not of the Certificate of Insurance, is likely to disclose to the purchaser any flaw in the vendor's title. This, however, would apply only in case of vehicles actually on the road.[88]

A partial solution of the problem is provided by voluntary registration. There was formed in 1938 a company called H.P. Information Ltd., which maintains a central register of motor vehicles which are being bought on hire purchase terms. The car is classified in their records under (a) registration number, (b) chassis number and (c) engine number. Unless all three of these particulars are faked, detection will be a simple matter. Even if the chassis number and engine numbers are filed off and others substituted, the substituted numbers must be those used for that particular 'vintage' of car, and it may so happen that a faked number will also appear as that of another car already entered on the register. Detailed knowledge of the 'vintage' particulars must therefore be acquired by the wrongdoer.[89]

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[84] The Road Vehicles (Registration and Licensing) Regulations, 1951, paras. 1 (3) and 6.

[85] See 92 S.J. 337, 411, 559.

[86] It is a little hard to agree with the view of Denning, L.J., in *Bishopsgate Finance Corporation Ltd.* v. *Transport Brakes Ltd.* (*supra*) when he said (at p. 338): 'Assuming therefore that the true owner keeps his logbook safe in his own name and in his own hands, it is unlikely that any stranger will get a good title to the car. A thief can only dispose of the car by forging some other logbook so as to give it the same number as the car or by altering the number plate so as to correspond with the number of another logbook; each of which is difficult to do in a way that is not noticeable to a careful purchaser'. See also *R.* v. *Thomas* (1949) C.L.Y. 1736.

[87] See (1950) 94 S.J. 556.

[88] See (1948) 98 L.J. 407, and Shawcross, *Motor Insurance*, 1949, pp. 633–637.

There are some 118 Finance Companies and Industrial Bankers throughout the United Kingdom who register all hire purchase agreements entered into by them. It is estimated that not less than 90 per cent of all current hire purchase agreements on motor vehicles and other articles, for example motor boats and aircraft, also on the register, are recorded with the Company. The register may be consulted by members of the Motor Agents' Association and by private motorists through the service supplied by the Royal Automobile Club and the Automobile Association. In so far as is practicable the register is completely up to date and contains details of hire purchase agreements within a matter of hours of their being entered into. The Company of course does not guarantee or accept any liability for the information provided.

During the first six months of 1950 the Company was asked to check on some 17,000 vehicles offered to motor dealers for sale. 624, or 4 per cent, were found to be the subject of current hire purchase agreements. It should be noted that these inquiries emanated from only some 3,000 motor traders who are at the present time using the service. The amount of outstanding hire purchase balances on these vehicles was £109,250. During the same six months the Company was asked to check on 28,608 vehicles which were offered for sale at public auction, and of these 858, or 3 per cent, were subject to hire purchase agreements, the balances outstanding being nearly £100,000.[90]

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[89] For a recent case concerning the filing off of these numbers, and some of the methods of obtaining logbooks, see a case at the Central Criminal Court reported under the heading 'Cars stolen in London' in *The Times* newspaper, January 30, 1952, p. 3.

Whereas the Hire Purchase Act, 1938, provided greater protection for hirers, new statutory provisions would now appear to be called for to secure the complementary interests of owners and third parties.

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[90] I should like to place on record my thanks to the Secretary of the Hire Purchase Trade Association, and to Mr. F. S. Miller, the Secretary of H.P. Information Ltd. for the facilities they have afforded me.

12

ROMAN CONTRIBUTIONS TO THE REFORM OF ENGLISH LAW

Raphael Powell

Sir William Holdsworth, writing of the sixteenth century Reception of Roman law, concluded with these words: 'We have received Roman law; but we have received it in small homœopathic doses, at different periods, as and when required. It has acted as a tonic to our native legal system, and not as a drug or poison. When received it has never been continuously developed on Roman lines. It has been naturalised and assimilated; and with its assistance, our wholly independent system has, like the Roman law itself, been gradually and continuously built up, by the development of old and the creation of new rules, to meet the needs of a changing civilisation and an expanding empire'.[1] Holdsworth was less prejudiced than Lord Coke against continental systems of law, but he never quite concealed his satisfaction that English law in the sixteenth century had successfully resisted the threat of a Roman invasion. His appreciation of the medicinal benefits of Roman law is, therefore, all the more to be valued. Nevertheless, the words I have quoted were written nearly thirty years ago, and even at that time men were beginning to realize that defects of the English legal system could not be cured by small doses of any kind of medicine, and that what was needed was either a series of major operations, or a prolonged system of therapy. More recently some attention has been paid to the possibility of grafting, so that the good qualities of our legal system and those of other legal systems might, by growing together instead of apart, produce a more healthy and a more flourishing organism. For this purpose the legal systems of the world fall into two main categories, namely (1) the Anglo-American systems; (2) the Roman systems.

The need for such a grafting as I have mentioned has been stressed recently by two eminent lawyers. One is Professor

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[1] Holdsworth, *History of English Law*, 1924, Vol. 4, p. 293.

Ernst Rabel, who wrote in 1949[2]: 'Human history has entered a new phase. That it should have produced "one world" we cannot very well see. But that the countries of western civilisation have awakened to a better consciousness of their historical relations and the immense stock of their common vital beliefs, endeavours and cultural resources—this is an overwhelming event that should never again be obliterated. The lawyers have compelling reasons and magnificent opportunities of showing the great work of consolidation, co-operation, mutual understanding, reciprocal aid, universal progress and international scientific development. Our foremost task is to bridge the age-old cleft that runs through the western laws, separating the Anglo-American "common law" from the "civil law"'. With that banner in front of him, Professor Rabel has written several articles in the *Louisiana Law Review* in which he has pointed out the chief features of the two main systems and set out the principal bases for a possible *rapprochement* between them.

The other is Lord Cooper. In a penetrating article in the *Harvard Law Review*,[3] he pointed out that the individualistic background of the past is being swiftly replaced by transformed conceptions of social functions and State interests; that statute and regulation, once the exception, are now the rule; and that private law is receding all along the line and public law is taking its place. He insists that the lawyers must not lag behind the demands of a rapidly progressing society, lest the law itself be brought into contempt. And he concludes in this way[4]: 'We shall need both the civilian and the common lawyer to tide us over the great transition; but if we are to preserve an even keel in the storms which are breaking, we shall need above all the ballast which only the civilian method of legal thinking can offer'.

It is significant that these statements come from lawyers who have seen both systems at work. Professor Rabel, an exile from his native Germany, had been able to see the legal methods of the United States at close quarters. Lord Cooper, a Scots lawyer, points out that, by virtue of that position, he is able to sit on the fence and view the common law and the civil law systems impartially. 'Scots law', he writes,[5] 'sits on the fence, Roman in origin, doctrine and method, but now largely infiltrated and overlaid by the later developments of Anglo-American law and by statutory changes enacted by a legislature predominantly English'.

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[2] Ernst Rabel, 'Private Laws of Western Civilisation' (1949) 10 *Louisiana Law Review*, p. 1. This is the first of a series of articles by Professor Rabel in the same volume.

[3] Lord Cooper, 'The Common Law and the Civil Law—A Scot's View' (1950) 63 *Harvard Law Review*, p. 468.

[4] *Ibid.*, at p. 475.

The articles of Professor Rabel and Lord Cooper might well have led me to the title and subject-matter of this paper—if only I had read them a year ago. In fact, however, I read them only recently, and the impulse which caused me to select my title began at a lecture on Law Reform which I heard nearly two years ago. The lecturer, who derided the need for learning Roman law to-day, called the attention of his audience to three fundamental present needs of English law, namely:—

1. a Minister of Justice;
2. a regular machinery for ensuring that the law is kept up to date; and
3. codification of the law.

I remember that at the time there flashed into my mind the words of Ecclesiastes[6]: 'The thing that hath been, it is that which shall be; and that which is done is that which shall be done: and there is no new thing under the sun'. For in all three respects, the Romans had been pioneers. Could not the prætor be called a Minister of Justice? Was not the prætor's edict a regular machinery for keeping the law up to date? And, for all its defects, was not the *Corpus Juris* of Justinian the earliest attempt at a systematic codification of law?[7] In these three matters alone Rome had provided the prototypes from which, with of course the necessary variations, the modern instruments of law reform could be fashioned.

The three major demands of the modern law reformers are stated also in that interesting collection of essays, edited by Professor Glanville Williams, called *The Reform of the Law.*[8]

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[5] Lord Cooper, *loc. cit.*, at p. 468.

[6] Ecclesiastes i. 9.

[7] The *Mishnah* is, of course, much earlier in date; but it contains much that is not purely law, and, in spite of a certain degree of arrangement of its subject-matter, is too full of mere associations of ideas to be regarded as systematic.

[8] *The Reform of the Law,* 1951, edited by Glanville Williams.

That book also contains a number of detailed suggestions for individual reforms. But, as far as I am aware, the book contains not a single mention of Roman law, and there are surprisingly few references even to systems of law modelled on the Roman pattern.

In this paper, too, no suggestions will be made as regards individual rules of Roman law which could well be grafted on to English law. That the Romans can still provide such rules even in the twentieth century is apparent if we mention only the Legitimacy Act of 1926, the Adoption Acts of 1926 and 1950, and the Inheritance (Family Provisions) Act of 1938. For our present purposes, however, it is sufficient to suggest that English law reformers have made no serious attempt to plumb the depths of Roman legal writings in order to extract from them individual rules of law which may, on a comparison with rules of English law, be found to be more suitable to modern needs. We do not need to resort to clichés such as 'history repeats itself' to realize that many problems of day-to-day human relations which face us now are, despite all the changes wrought by centuries of progress, not always so fundamentally different from those which faced the Romans nearly two thousand years ago.

The rest of this paper will be concerned with those respects in which I believe that the Roman legal system can make its most important contributions to the reform of English law.

THE MACHINERY OF LAW REFORM

At a comparatively early stage in Roman legal history the Romans realised that their legislature was altogether too unwieldy a body to effect the bulk of the reforms in the law which are necessary to meet the needs of a rapidly progressing community. They, therefore, acquiesced in the existence of a system whereby the prætor, an annually elected magistrate, should have power to effect substantial changes in the law through his control over legal procedure and his power of giving orders. The prætor was used as an active instrument of law reform from about the middle of the third century B.C. until the beginning of the Empire, and in a lesser degree he continued to be in this position until the codification of the Edict in the reign of Hadrian. From Hadrian's time onwards the responsibility for law reform was vested, nominally at least, in the hands of the Emperor. If we go beyond this bare historical statement and look more closely at the methods which were used, we can see the emergence of certain salient features.

(1) The Roman machinery was sufficiently simple to secure constant review of the law and to effect changes as rapidly as possible. I do not say that Roman law as a result never contained anything antiquated, or that reforms in the law were invariably effected as soon as they became necessary. I do say that, apart at any rate from the power of veto of other magistrates, there was no constitutional bar to the achievement of reform.

In this country legal reform depends on one of three accidents:—

(a) The Government takes the initiative and allots time for the introduction of a reform bill into Parliament; or

(b) A private member is successful in a ballot for such little time as the Government may allot for the introduction of private members' bills; or

(c) A case which may involve a change in legal principle comes before the courts, and a judicial decision in favour of such a change is given by the court.

In Rome a private member of the Republican legislature could not introduce a bill at any time—the power to initiate a bill was vested only in the magistrates, *i.e.,* in the government. But as long as a popular legislature existed it was a cumbrous instrument for law reform, and in any case could do little beyond registering the votes of its voting units. No doubt changes in legal principle could be effected through the courts by following the prevailing opinion of the jurists. Primarily, however, the reform of the law depended on a governmental body which, provided that we do not draw too close parallels with modern institutions, we may call a Ministry of Justice. Originally, the Ministry consisted of the prætor alone; later it was the prætor advised by a *consilium*; and later still it was the Emperor, not only advised by a *consilium,* but also assisted by a legal civil service.

(2) The instrument of law reform was always able to obtain the best advice of the day. The leading practitioners not only advised their lay clients on the drafting of formulas for the purposes of litigation, but also may well have been responsible

for at least advice upon, if not the actual drafting of, the edicts of the magistrates.[9] Even the earlier Emperors summoned lawyers to the imperial council. In Hadrian's reign, however, the leading jurists of the day were an important element in the council which now became a permanent body concerned principally with the legal work of the Emperor—with the issue of rescripts and decrees, and perhaps also with the drafting of imperial legislation. In the earlier Empire, a special member of the civil service, the secretary *a libellis,* who was a lawyer, was concerned with petitions sent to the Emperor for advice on points of law. In the later Empire, the *quaestor sacri palatii,*[10] again a lawyer, prepared not only answers to petitions but also drafts of laws.

In England there is no difficulty in finding counterparts of these Roman institutions. The Lord Chancellor and the Law Officers of the Crown are members of the Government. Every department of Government has its own permanent legal staff. There are parliamentary counsel, concerned particularly with the drafting of bills, and in recent times more actively concerned with periodical law revision. But none of these persons can be said to have the primary job of keeping the law as a whole up to date, although individual departments of Government may be responsible for isolated sections of the law.[11] No doubt, also, leading members of the legal profession may be asked to give evidence before Royal Commissions which inquire into the need for law reform. But who can tell what dilutions and delays may take place before their views, individual or collective, are translated into rules of law? The close contact which was to be found in the Roman system between the leading legal opinion of the day and the legislative instrument of legal change could be reproduced in some measure in this country. It would be necessary to appoint a Minister of Justice, himself a lawyer, who should be allotted time for the introduction of bills for law reform. The Minister would have a permanent legal staff, divided, I would suggest, into at any rate three sub-departments with the following specific functions: (a) research into legal history, including research into current legal literature; (b) research into comparative law; (c) drafting. Further, the Minister should have a Standing Law Revision Committee consisting of the leading lawyers of the day, both practitioners and teachers of law, who would suggest proposals for, and even advise on some of the details of, measures of law reform. The Ministry should, as part of its normal functions, obtain expert advice from whatever persons may usefully offer that advice—from specialist lawyers, from economists, from representatives of employers and employed, from scientists, from experts in foreign systems of law, and from any other persons whose opinions can be relevant to proposals for reform.

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[9] Schulz, *Roman Legal Science,* 1946, pp. 52–53.

[10] Professor Jolowicz describes him as a Minister of Justice. Jolowicz, *Historical Introduction to the Study of Roman Law,* 1939, p. 443.

[11] *The Reform of the Law,* pp. 9–14.

All this seems to be taking us far from Rome. I have tried to show that the Romans maintained a closer contact between the legal profession and the constitutional instruments of law reform. Were they equally astute in obtaining the best available advice of the day, even from persons who were not necessarily lawyers? Let us look at our third feature of the Roman machinery.

(3) For a considerable period during the Republic, if not in the early years of the Empire as well, the magistrates responsible for law reform sought and obtained the advice of the Senate. While it cannot be said that the Senate consisted of experts in specialised fields, for the most important period of its history its membership was confined to ex-magistrates, most of whom had experience of public administration, and some of whom had had practical knowledge of the defects of the law through serving in offices concerned with legal administration. The Senate, moreover, was a comparatively stable body—an assembly in which men of experience could discuss proposals for legislation in a manner which was not possible either in the popular legislatures or in the mass meetings (*contiones*).

Without arriving at any decisive opinion on the matter, I throw out the suggestion that proposals for law reform in this country might well be initiated in the House of Lords rather than in the House of Commons. In doing so I must make it clear that the term 'House of Lords' in this connection should signify a reformed second chamber wholly constituted by reference to public experience, somewhat in the manner of the Roman Senate. And it is equally important that in such a second chamber there should continue to be adequate time for careful consideration of proposals for law reform.[12]

(4) The prætor was elected annually and his edict, in theory, lasted for only one year—at any rate, until the codification of the Edict under Hadrian. In practice, the tradition of the office of prætor, a certain degree of conservatism, and probably also the tradition of the legal profession itself, combined to check the initiation of any drastic revolutionary reforms. As a result, there was a tendency for each prætor to repeat substantially the greater part of his predecessor's edict. Nevertheless, in theory, any new reform contained in the edict was experimental for one year only.

I would not suggest that a Minister of Justice should be appointed for one year at a time, or indeed for any specified period. In this country the interplay of party politics, both between different parties and within each party, is normally sufficient to prevent any Minister holding office for too long a period. Moreover, while some measures of law reform may be non-controversial from the point of view of party politics, there are other measures upon which differences of opinion will follow the traditional party lines. The Minister of Justice, therefore, must inevitably carry the label of a party. I see nothing wrong in that, because on non-political measures it should still be possible to rely on the stability of the permanent legal staff of the Ministry, and on the Minister's own zeal for law reform as a member of the legal profession. However, to return from this digression, modern law reformers should consider whether and to what extent a Minister of Justice ought to be entrusted with delegated powers of legislation in order to ensure that, at any rate within some branches of the law, his measures of reform should be experimental only. If these measures are prepared with the thoroughness which has been suggested in this paper, it may be that there is no place for a delegated power of legislation at all. Perhaps there is room for a *media sententia.* Some proposals are carried only after a fairly even division of opinion. It is suggested that the Minister should, at his discretion, recommend the inclusion of a provision in the enacting statute to the effect that sections dealing with these proposals should remain in operation for a period of, say, one year after the date of enactment; and that, thereafter, any such section should continue to be operative only if both Houses so resolve. In this way the onus would be thrown on the Minister to justify, after a specified period, the continuation of a provision which, having regard to the original divergence of opinion upon it, might be regarded as being fairly in the nature of an experiment. In this way, too, the advantages of the Roman system might be adapted to English constitutional practice.

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[12] See, further, R. C. FitzGerald, 'The House of Lords and its Reform' (1948) 1 *Current Legal Problems*, pp. 69–88.

CODIFICATION

Of the Twelve Tables we need say nothing because parallels can be found elsewhere in abundance,[13] and because it was, perhaps, an isolated phenomenon in Roman legal history.[14] Its main importance lay in the fact that, after a period of class warfare, the law—or at any rate the lesser known part of the law—was put into writing and made known to all the people. That need no longer concern us because English law has long ceased to depend on oral tradition. Anybody can discover any rule of English law if he knows where to look for it and can understand it when he has found it.

The revision and codification of the Edict under Hadrian is more important as an historical event than for its contents. It teaches us that when a particular source of legal development has dried up, it is as well to recognise that fact as soon as possible; to preserve the surviving useful products of it for posterity to develop by more modern methods; and to make sure that new sources of legal reform and development are allowed to have free and unrestricted play. Hadrian recognised clearly that the prætor's edict as a law-reforming instrument had, probably by imperial design rather than by accident, ceased to be efficient. He therefore ordered Salvius Julianus to revise and codify the existing edicts, and this codification became the basis for future commentaries and collections of *responsa*. On the other hand, from Hadrian's reign we can see a clear beginning of new forms of legislation and methods of securing law reforms by more rapid means.

I shall say little of the other codes which preceded the *Corpus*

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[13] See A. S. Diamond, *The Evolution of Law and Order*, 1951, pp. 120–300.

[14] Schulz, *Principles of Roman Law*, 1936, p. 7.

Juris. They show that, already before Justinian's reign, the Romans had realised the necessity for at least confining within an elegant corset the ungainly bulk of Roman law. Indeed, the original plan conceived by Theodosius, of collecting both statute law and the work of the jurists in a classified arrangement of subject-matter, was as ambitious a project as any which have been put forward by modern advocates of codification. But De Visscher is undoubtedly right in his view that Roman law was not yet ripe for the realisation of such a plan, because there had as yet been no revival of legal science in the law schools of the Roman Empire.[15] The failure of Theodosius to realise this major project is, perhaps, a salutary warning for to-day, that codification is best achieved at a time when legal science is vigorous and when both judges and law teachers are at the height of their creative capacity. I remember saying once that the difference between women and men as cooks is that for women cooking is a labour of love, while for men it is a work of art. So, too, all the goodwill and industry in the world will not produce a satisfactory code of law. Codification is a work of art, needing the skill of the inspired craftsman. He must be able to discriminate between good materials and bad; to use well the good materials at his disposal and even to improve upon them where that is necessary; to design new materials or new forms to meet new needs; and finally to combine the whole of his work into an instrument which is pleasant in form and easy to handle, and the parts of which are simple to understand.[16]

The most important work of Roman codification was the *Corpus Juris.* Of course, it was important because it was the first attempt of its kind to sift an enormous mass of law and reduce it to a reasonably compact size, arranged in a more or less orderly sequence of subject-matter. And it was important also because it was the foundation upon which the civilians and the canon lawyers of later centuries were able to build a legal edifice which became the pattern for many legal systems.[17] For the purpose of this paper, however, I will begin by suggesting that its importance lies not only in what it was, but also in what it was not. It is comparatively easy to follow a pattern set by another person; it is more important to be able to discover the defects of that pattern and to make sure that these defects are not repeated.

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[15] F. de Visscher, 'Le Digeste', 1930, published in *Nouvelles Etudes de Droit Romain Public et Privé,* 1949, pp. 331–352, at p. 350.

[16] Cf. Lloyd, 'Codifying English Law', (1949) 2 *Current Legal Problems,* pp. 155–171.

[17] See Holdsworth, *op. cit.,* p. 217 *et seq.*; Vinogradoff, *Roman Law in Mediæval Europe,* 1909, p. 32 *et seq.*

(1) The *Digest* was produced too quickly. It has, of course, often been suggested that because three years seems too short a time in which to achieve so enormous a task, there must have been some kind of unofficial pre-Digest upon which Tribonian and his commission worked. That view has generally not been accepted. However, it is a useful hint that the codification of case-law will probably need a multiple operation of gradually diminishing processes before the final result is achieved. But the chief moral which appears from any observation of the defects of the *Digest* is that a job of this kind must not be hurried. The authors of *The Reform of the Law* wisely adopt that principle: 'We do not suggest that codification can or should be a speedy process. The work must not proceed so quickly that those who are interested in the subject cannot keep a careful eye on it as it goes along'.[18] They also suggest, however, that a beginning must be made, and made at once. It is interesting to observe that the *English and Empire Digest*, originally produced in a period of some thirteen years, and subsequently maintained by annual supplements, is now being replaced by individual volumes on large and important branches of the law.

(2) The material of each title in the *Digest* is seemingly ill-arranged. It is admitted, at once, that this is an uncharitable criticism. For a first venture, the arrangement of material in each title, whatever defects it may show to the eye of a modern legal scientist, is, on a more generous view, astoundingly good. In particular it is good by comparison with the *Mishnah*, which depends more frequently on mere association of ideas. By modern standards the *Digest* contains many defects of scientific arrangement. At the same time, the Romans were not altogether lacking in a sense of arrangement, and these defects of the *Digest* may be a warning that it is advisable not to make a fetish of the strictly analytical method. That is sometimes apparent in the arrangement of subjects in modern European codes. Sometimes, the strictly logical sequence may need to yield to a more natural association of subjects resulting from practical experience.

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[18] *The Reform of the Law*, p. 21.

(3) In the *Digest,* and in the *Corpus Juris* as a whole, there are a number of inconsistencies. Again, this is a carping criticism, and one must not expect too much of so early a work in the world's legal history. The surprising fact is that there are not more inconsistencies in so large a production achieved in so short a time. If there is a warning here for our own day, it is that any codification requires the closest possible co-operation between the units of persons working upon it, and the most careful supervision and co-ordination by other persons who are able to see the project as a whole.

(4) The *Digest* contains too many anachronisms. Despite all the good intentions of Justinian there still remain in the *Digest* many archaic relics, as Riccobono calls them. Indeed, Riccobono seems to have considered the *Digest* with some affection as a treasure-house of Roman legal history from the XII Tables onwards.[19] It is submitted, however, that any modern codification or digest of law must be careful to separate the living law from the dead law which is fit only for the show-cases of a legal museum.

(5) The *Corpus Juris* separates statute law from case law. Several hundred years later the two sources of law were reunited in the *Basilica.* No question of separation need arise in a modern codification, because the code itself would be in a unitary statutory form, without regard to the origin of its contents.

There are also certain positive features of the *Corpus Juris* to which the modern reformer might well give attention.

(1) The opinions collected in the *Digest* are taken not only from the *responsa* of practising lawyers but also from textbooks and the writings of law teachers. I have already suggested that one sub-department of a Ministry of Justice should be concerned with research into legal history, including research into current legal literature.

(2) There were a number of law teachers among the compilers of the *Corpus Juris.* I have already suggested that teachers of law should be included in the Standing Law Revision Committee of a Ministry of Justice; and I have also stated my view that a codification project needs the environment of a vigorous liveliness of legal science. The contribution to law reform which can

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[19] See references cited in Schulz, *Principles of Roman Law,* pp. 138–139, n. 4.

be made by teachers of law cannot be stressed too much. They, rather than the practitioner, are concerned with what the law ought to be. They are often better able to discern the social consequences of the rules which emanate from the legislature and from the courts. They, above all, can bring to the work of law reform an independence of thought which is not specially manufactured for the occasion but which, if they are intellectually honest, is part of their normal attitude.

(3) The *Digest* was intended by Justinian to make a complete break between the past and the future. We are not concerned with Justinian's transparently vain hope that the *Digest* should be the last word on Roman law. The relevant point to be noted here is that all material which had been removed by the compilers was intended to be for ever excised from the body of Roman law. If we may judge from the work of some of the legal historians and textual critics of the last century, Justinian would have needed to exorcise, and not merely to excise, the material which was removed from the *Digest*. How often do we find that the ghosts of past interpretations of laws rise up to rule us from their graves. That is a problem to which my colleague, Mr. Lloyd, so ably called attention in his paper on *Codifying English Law* in the 1949 series of these lectures.[20] Repeatedly we find that statutory provisions, particularly in some of our codifying statutes (such as the Partnership Act, 1890, the Sale of Goods Act, 1893, and the Companies Act, 1948), are interpreted by the courts in the light of earlier decisions. Mr. Heber Hart has suggested that subsequent citation of earlier cases could be forbidden.[21] But if an ambiguity of meaning in a statute can be resolved only by reference to a decision in an earlier case, no prohibition in the world could prevent counsel or a judge from resorting to a legal museum in order to discover how his predecessors had dealt with a similar problem; nor need he even mention the source of his knowledge. The only way of avoiding recourse to the museum is to ensure, as far as is humanly possible, that there will be no need to go back to the museum. The modern movement in favour of simplicity of language and of expression may go far to avoid ambiguities in statutory provisions. It is possible that to-day no provision of a codifying

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[20] Lloyd, *loc. cit.*, p. 168.
[21] Hart, *Way to Justice*, 1941, pp. 42–43.

bill would reach the statute book without consideration of conflicts of interpretation which have appeared in the existing case law on the subject. It is important that where such conflicts appear the code should clearly decide in favour of a particular interpretation. There, too, the Roman *Digest* is a model. Quite apart from the *Quinquaginta Decisiones* of Justinian, the *Digest* frequently uses comparative adjectives or adverbs which indicate to the reader that a previous conflict of opinion has been settled by the compilers, either by adopting the view of one jurist in preference to that of another, or by resorting to a *media sententia* or an entirely new interpretation. I am far from suggesting that these methods are infallible. Words are like little children. Put them in one kind of company and their behaviour is normal; put them in another kind of company and they behave atrociously, so that no one would believe that they are the same children. So the aspect of words may vary in different contexts.[22] If the context is one which is already known the draftsman can more easily supply a definition; if the context is a new one, it is all the more important that the draftsman should—and he usually does—supply a definition.

I cannot conclude this part of my paper without another reference to Lord Cooper's article. He points out that, whatever may be the merits or demerits of codification, 'it is the systems codified and applied on the civilian principle which have spread far and wide throughout the modern world as a result of voluntary imitation and free adoption . . . Anglo-American common law by contrast has been imposed by conquest and has followed colonisation, but it has rarely or never been freely chosen by any modern state'.[23]

THE USE OF PRECEDENTS

This section will begin with Lord Cooper's comment on the doctrine of the individually binding precedent. He says[24]: 'For practical reasons, if for no other, the rule is bound to be abandoned soon, because the crushing weight of centuries of law reports, digests and indices has become all but overwhelming, and it is fast increasing every year. But, practical considerations apart, is there any answer to the protest of Holmes that it is revolting to act in blind imitation of the past and to magnify consistency at the expense of common sense? Too often the imitation of the past is a 'blind' imitation, for the parallelism between cases is much less common than we lawyers pretend'. It would be wrong to suppose that the Romans did not have a doctrine of binding precedent. But, whether we look at the rescripts and decrees of the Emperors, or at the *responsa* of the jurists, it seems clear that the Romans were at all times averse to the acceptance of an isolated decision or an isolated opinion as a binding precedent. Even the rule of the Law of Citations that, where the opinions of the authoritative jurists were equally divided, the view of Papinian's side should prevail, shows clearly that an isolated opinion of even so eminent a lawyer as Papinian would not be regarded as having binding authority; it is Papinian's side which prevails, not Papinian alone. Throughout the history of Roman legal science, however, if we discount the mathematical rules of the Law of Citations, the opinion or decision of a jurist is of binding authority only if it represents the *communis opinio* of juristic thought.[25] In theory, no doubt, an isolated opinion can be accepted as the *communis opinio* from the moment of a single pronouncement. Even then it is not the single pronouncement, but the general acceptance of the opinion, which gives it binding authority; and in practice an opinion would have to be repeated and followed many times before it would be regarded as the *communis opinio*. There would have to be, as it were, a custom to treat the opinion as binding. That method of treating precedents, which is also used in modern legal systems which have followed the Roman pattern, has surely much more to commend it than the English method of the individual precedent. The maxim of the English court appears to be '*Sum, ergo cogito*' instead of '*Cogito, ergo sum*.' The quality of careful thought is attributed to a judge's decision simply because he is a judge, whereas his quality as a judge ought to be deduced from his capacity for careful thought. The system whereby an individual precedent is treated as binding flatters a bad judge and does not give full credit to a good one.

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[22] Contrast the use of the word 'prescription' by a lawyer with its use by a doctor.

[23] Cooper, *loc. cit.*, p. 472.

[24] *Ibid.*, p. 473.

[25] See F. de Visscher, 'Le "*ius publice respondendi*"', 1936, published in *Nouvelles Etudes de Droit Romain Public et Privé,* 1949, pp. 299–327, at p. 316; A. Magdelain, 'Jus respondendi', (1950) 27 *Revue Historique de Droit Français et Étranger,* pp. 1, 157.

If the Romans had accepted the binding force of an individual precedent, they would have avoided its ultimate defect because the Emperor was not only the final court of appeal but was also the sovereign. At any rate in theory, therefore, he was not bound by his own decisions, while in practice he seems to have been reluctant to concede that his decisions in individual cases should be regarded as having general application to other cases. In this country, however, the House of Lords is the highest court of appeal but is not the sovereign authority. It is bound by its own decisions, and of course its decisions are binding on lower courts. It is admitted that inconvenience would result if the decisions of higher courts were not binding on inferior courts. But is there any good reason why the House of Lords, or indeed the Court of Appeal, should not give effect to its second thoughts and reach a decision different from that which it has given on a previous occasion? The distinctions to which the higher courts resort in order to justify a departure from a previous decision are sometimes too finely drawn to be clearly perceptible. Would it not be better if the higher courts could openly admit that, on further reflection, they had reached a different conclusion? If that practice were adopted, the fact that the higher court had *not* reached a different conclusion on the second occasion would strengthen the value of its judgment. A judgment dictated by the necessity of following an unbending rule is surely of less value than a judgment which results from a free inclination to follow an earlier practice. There should be nothing startling in this suggestion to shock the English mind. The Judicial Committee of the Privy Council has not been fettered by its own decisions. Moreover, it is frequently only by repeated usage that a particular constitutional practice becomes recognised as a constitutional convention. It is often said that there would be no certainty in the law if the higher courts were free to change their minds as and when they pleased. I remember an audible aside of the late Sir Maurice Amos at a meeting of the Society of Public Teachers of Law some years ago, when he said: 'The only people who want the law to be certain are the lawyers'. Be that as it may, there is no evidence that the law of the Romans was any less certain than our own law. Nor was it less certain because they preferred the *communis opinio* to the isolated precedent. Indeed, it is sometimes said that the Romans disliked radical reforms and tended to be conservative in their attitude towards new theories.[26] They were prepared to admit that a *communis opinio* could change,[27] but the very fact that an opinion was widely held tended to check sudden changes and so to produce a more even flow in the course of legal development. I do not think that this conservatism is a necessary and inevitable consequence of the Roman attitude towards precedents, because much will depend also on the stresses and strains to which a community is exposed and on the prevalent tempo of progress in other communities.

THE POSITION OF EQUITY

Equity began in this country under the influence of men who were trained in civil law and in canon law. It was an inherent element even in the early common law at a time when the judges were ecclesiastics. In the course of time, however, Equity became a second set of formal legal rules comparable with the common law.[28] In Rome, however, Equity from an early period was always treated as a method of thought which could be found in the edict, in the statutory sources of law, in the opinions of lawyers and in the decisions of courts. It was, therefore, always a live force in legal development.[29] Thus, it was apparent even from classical times in those opinions which were opposed to the malicious exercise of proprietary rights.[30] It was apparent in the humanitarian legislation of Hadrian[31] and of Constantine. In this country, it is only in this century that we are beginning to appreciate the need for a new Equity which will give the courts a more flexible approach to the rapidly changing needs of modern society. On that subject, however, Lord Justice Denning had more to say in his presidential address to the Bentham Club this year.[32]

THE EMPIRICAL APPROACH

The comparison between the approach of the Roman lawyer and that of the English lawyer to legal problems is one which has produced an astounding divergence of opinion. Thus, Gray has written that the civil lawyers did not attach the weight which the common lawyers were more and more coming to attach to the actual cases decided in the courts.[33] That view is approved also by Holdsworth.[34] More surprisingly, the view is stated also by Lord Cooper, who says[35]: 'The civilian naturally reasons from principles to instances, the common lawyer from instances to principles. The civilian puts his faith in syllogisms, the common lawyer in precedents; the first silently asking himself as each new problem arises, "What should we do this time?" and the second asking aloud in the same situation, "What did we do last time?" The civilian thinks in terms of rights and duties, the common lawyer in terms of remedies. The civilian is chiefly concerned with the policy and rationale of a rule of law, the common lawyer with its pedigree. The instinct of the civilian is to systematise. The working rule of the common lawyer is *solvitur ambulando*'. Lord Cooper has the grace to concede at once that this is a deliberate overstatement, but only because 'the gulf which separates the two juristic methods has notably narrowed in the last half century'. It was Buckland's view that these differences between the Roman approach and the English approach were greatly exaggerated. And recently Sir Arnold McNair and Professor Duff have written[36]: 'It has been erroneously asserted that in legal approach the Roman lawyer and the English lawyer are at opposite poles—the former deducing his conclusions from principles and the latter inducing them from a mass of decisions. Buckland insisted that there was a remarkable kinship between the Roman lawyer of the classical period of law and his English colleague, and that, if they had found themselves together in the same chambers writing and discussing opinions, though their materials were different, their methods of handling them would have had much in common'. In his *Principles of Roman Law* Schulz has repeatedly mentioned and illustrated the Roman aversion to general principles.[37] In his view 'the classical jurists were still inclined to look upon and treat private law from the point of view of the legal remedies for enforcing private law',[38] while 'the post-classical era looked more leniently on abstract formulas, and many an abstract theoretical rule in the texts of our classical jurists originated in the later period'.[39] Albertario, on the other hand, believed that the Roman practice was to use precise dogmatic formulas, while the Byzantines preferred to take account of the particular facts of a case and to avoid the disadvantage or inequity of applying Roman legal principles too rigidly. He gave a number of instances in which the compilers of the *Digest* had allowed exceptions to general rules by means of what English lawyers would call the principle of severability.[40] More recently, Mr. Lloyd, blissfully unconcerned with the times at which Roman legal history manifests principles or particularities, has written[41]: 'Admiration, however, of the Roman achievement in legal science should not conceal the fact that the *Digest,* by its emphasis on particular points rather than general principles, and also its extreme bulk, does not by any means conform to modern notions of codification'.

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[26] Schulz, *Principles of Roman Law,* p. 83 *et seq.*

[27] A. Magdelain, *loc. cit.,* p. 169.

[28] See Holdsworth, *History of English Law,* Vol. 4, pp. 287–288.

[29] Cf. Rabel, 10 *Louisiana Law Review,* p. 436.

[30] Riccobono, 'La teoria dell' abuso di diritto nella dottrina romana', (1939) 5 *Bullettino dell' Istituto di Diritto Romano* (N.S.), p. 1.

[31] Pringsheim, 'The Legal Policy and Reforms of Hadrian', (1934) 24 *Journal of Roman Studies,* p. 141, at pp. 143–144.

[32] Above, p. 1.

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[33] Gray, *Nature and Sources of Law*, 1909, p. 261.

[34] Holdsworth, *History of English Law*, Vol. 4, pp. 224–225.

[35] *Loc. cit.*, p. 471.

[36] McNair and Duff, 'William Warwick Buckland 1859–1946', (1951) 33 *Proceedings of the British Academy*, p. 287.

[37] Schulz, *Principles of Roman Law*, pp. 25, 30, 36, 40–65.

Now it is quite true that there are some general principles in the *Digest,* but the greater part of the *Digest* is taken up with practical cases and particular points. Moreover, no modern writer would be safe in accepting the validity of a general principle stated in the *Digest* unless he had carefully ensured that other texts on the same subject proved that the general principle really was a general principle and also that it was not eaten away by too many exceptions. That is particularly true of the legal maxims contained in the *Regulae Juris* at the end of the *Digest.* Indeed, as Eugene Wambaugh has pointed out, maxims such as these are often only compendious statements of a general principle and show that in many cases the general rule cannot be applied.[42] The preponderant tendency of the Roman texts, then, is to use the empirical approach, dealing with particular cases. One is frequently surprised by the fact that Roman law does not seem to have reached a general principle where, from the modern standpoint, one would expect a general principle to have evolved. Roman law in Justinian's day had nearly but not quite reached a general theory of contract; yet there were very few agreements which were not actionable. Save perhaps for some minor exceptions, it had not reached the general principle of direct representation in matters of contractual agency; yet there were few cases in which a principal could not sue and be sued for the contracts of his agents. It had not yet arrived at any general remedy for unjust enrichment; yet there were few cases in which a *condictio* could not be brought for unjust enrichment. There are other examples of a similar character. But what is the reason for them? Was it entirely due to conservatism, as Schulz suggests?[43] Was it merely an obtuse inability to see the wood for the trees? I would suggest that neither answer is satisfactory. By Justinian's time, the Romans had been subjected in turn to Greek philosophy, to Christianity, and to other civilising influences of the peoples of the Roman Empire. Maybe these influences were effective only after long delay and not without some show of resistance by the Romans. Nevertheless, it is difficult to believe that the Romans in Justinian's day failed to draw the inevitable broad conclusions from particular instances through either native pride or inability to see a general principle. I would suggest, rather, that when they did not draw the general conclusion which seems so obvious to the modern lawyer—or indeed which seemed so obvious even to the medieval civilian—they did so deliberately, either because they could no longer see clearly, or perhaps because they saw only too clearly, the pitfalls in the path ahead. And that, I suggest further, is an important warning to modern law reformers. General principles, by virtue of their generality, are sometimes fraught with danger, and the recognition of exceptions to a general principle which has once become established sometimes does not take place until too many hard cases have resulted from an over-tidy demand for uniformity. Take, for example, the rule that the action of *assumpsit* lay only where the plaintiff could establish an express or an implied promise; or the rule that every simple contract must be supported by consideration; or the rule that no action for damages lies for misrepresentation in the absence of the defendant's intent to deceive the plaintiff; or the supposed general rule that an agent creates privity of contract between his principal and a third party; or a host of other general principles which lead to inequities and even absurdities when carried to their logical conclusions. It is a matter for discussion whether English law has not been too ready to accept general conclusions before it was prepared for their consequences. The empirical method is useful, not only in feeling one's way to a broad path, but also in deviating from that path to make exceptions for particular cases.

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[38] Schulz, *op. cit.,* p. 41.

[39] *Ibid.,* p. 52.

[40] Albertario, 'Le valutazioni quantitative nel diritto giustinianeo e nelle legislationi moderne', (1937) 5 *Studi Albertario,* pp. 293–307.

[41] Lloyd, *loc. cit.,* p. 159.

[42] Wambaugh, 'A problem as to ratification', (1896) 9 *Harvard Law Review,* p. 60.

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[43] Schulz, *Principles of Roman Law,* pp. 95–97.

UTILISATION OF FOREIGN EXPERIENCE

Perhaps it is true to say that the Romans were as cautious of accepting foreign legal concepts as English lawyers are of accepting Roman ideas. Probably, as Schulz has pointed out, the Roman attitude varied at different periods, and with different branches of the law.[44] It seems clear, however, that Rome not only absorbed many legal principles from the *peregrini* who attended her courts, but also extended her own law to every part of the Empire after Caracalla's general grant of citizenship in A.D. 212. In the later Empire, also—though on this point there are strong differences of opinion—there is evidence of borrowings from Greek law and practice. At any rate between the thirteenth and the sixteenth centuries the universality of Roman law was an important factor in the readiness with which European states were prepared to receive its principles.[45] Its influence on the growth of international law has been pointed out many times, and particularly, within more recent times, by Professor Rabel[46] and Professor Plucknett.[47] Rabel concludes his articles with an appeal to courts throughout the world to learn to use foreign experience.[48] I have already suggested in this paper the desirability of including in a Ministry of Justice a sub-department for research in comparative law. The national and international machinery which already exists for exploring the differences between the laws of states should also be set to discover how far those differences can be removed. They are not so fundamental as is often supposed and, as Rabel has pointed out, their lines are already converging in many respects. The law of Rome became a universal law because it was realised as early as the third century B.C. that only by harmonising foreign law with the civil law could the courts of Rome give adequate remedies to the inhabitants of a rapidly expanding Empire. It may be that today a major contribution of Roman legal history is to teach us that we must seek to eliminate the need for such a body of rules as those contained in the subject called 'Conflict of Laws'.

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[44] Schulz, *op. cit.*, p. 124 *et seq.*

[45] Holdsworth, *History of English Law,* Vol. 4, pp. 240–241.

[46] Rabel, *loc. cit.*, p. 9.

[47] Plucknett, 'The Relations between Roman law and English common law down to the sixteenth century', (1940) 3 *Toronto Law Journal*, p. 24, at p. 45.

[48] Rabel, *loc. cit.*, p. 448.

In this paper I hope that I have said nothing new and nothing revolutionary. My purpose has been to place in juxtaposition some of the aims of the modern law reformers on the one hand and some of the institutions of Roman legal history and law on the other hand. If the threads which connect them are not easily seen, I would aver that there are many modern concepts in which it is not always easy to see a connection with older ideas. It is possible that Maitland would have disagreed. He once wrote: 'It is pleasant, and I even believe that it is profitable, to trace the origins of legal rules in the social and economic conditions of a bygone age. But any one who really possesses what has been called the historic sense must, so it seems to me, dislike to see a rule or an idea unfitly surviving in a changed environment. An anachronism should offend not only his reason, but his taste. Roman law was all very well at Rome; medieval law in the middle ages. But the modern man in a toga, or a coat of mail, or a chasuble, is not only uncomfortable but unlovely'.[49] We are not looking for anachronisms, however; nor can we say that a rule or concept of ancient law is an anachronism until we have tested it in modern conditions. To do that fairly we may need to modify it, to add to it, perhaps even to give it a development which it never received before because earlier generations falsely regarded it as out of date. But do not let us disregard it altogether because it comes from an ancient source. Men may not put new wine into old bottles, but old wine may safely go into new bottles. Or, if I may change and reverse the metaphor entirely, clear and refreshing water may often come from an old well.

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[49] Maitland, *Collected Papers,* Vol. 3, pp. 486–487.

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THE INTERNATIONAL LAW COMMISSION

B. Cheng

The General Assembly of the United Nations, following a report of the Committee on the Methods for Encouraging the Progressive Development of International Law and its Codification,[1] created on November 21, 1947, by Resolution 174 (II), the International Law Commission to give effect to Article 13, paragraph 1 (*a*) of the Charter. 'The promotion of the progressive development of international law and its codification' constitutes the object of the Commission.[2]

Its specific functions, as defined by its Statute, are threefold:

(1) To formulate rules of international law *de lege feranda,* at the request of the General Assembly,[3] on matters which are not yet regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. This is described as the progressive development of international law.[4]

(2) To codify existing international law by giving it a 'more precise formulation and better systematisation'.[5]

(3) To consider ways and means for making the evidence of customary international law more readily available.[6]

The fifteen members of the Commission, chosen for their 'recognised competence in international law',[7] were originally elected in November, 1948, for a term of three years, but their term of office has now been extended for a further two years.[8] The Commission has so far held three sessions,[9] but, as one of the members of the Commission, Mr. Spiropoulos, has remarked, 'there is too little knowledge of the work done by the Commission',[10] perhaps as a result of the fact that only a few of the documents relating to it have so far been published. However, irrespective of financial considerations, the predominant view in the Commission does not favour the publication of its summary records.[11]

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[1] United Nations Document A/AC.10/51.

[2] Statute of the Commission, Article 1.

[3] The Commission may also give preliminary consideration to proposals transmitted to it by the Secretary-General of the United Nations, emanating from Members of the United Nations, the Principal Organs of the United Nations, other than the General Assembly, Specialized Agencies, or official bodies established by international governmental agreements to encourage the development of international law and its codification. But it should not proceed to act upon such proposals definitively until the General Assembly invites it to do so (Article 17 (2d)).

[4] Articles 15, 16–17.

[5] Articles 15, 18–23.

[6] Article 24.

[7] Article 2 (1). For an interpretation of the meaning of this provision casting light indirectly on the status of the Commission, see Report covering 2nd Session, A/CN.4/34, paras. 4–7.

The Commission has in fact already completed one of its three specific duties: consideration of ways and means for making the evidence of customary international law more readily available. The result of its deliberation was presented to the General Assembly in the Report covering the second session.[12] The General Assembly has since invited the Secretary-General to report on the Commission's recommendations.[13]

As regards codification, fourteen topics have been provisionally selected as necessary and desirable, of which three were initially given priority.[14] Of the three, little progress has as yet been made on the topics of arbitral procedure[15] and the law of treaties.[16] It is on the third topic, *viz.*, the regime of the high seas, that the Commission has made most headway and has succeeded in producing a set of draft articles on the continental shelf and related subjects.[17] But by concentrating on this aspect of the high seas the Commission has left the field of codification to engage in that of the progressive development of international law.[18]

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[8] Resolution 486 (V) of December 12, 1950, of the General Assembly.

[9] In the summer of 1949, 1950, 1951. See the three Reports covering the three sessions, respectively A/CN.4/13, A/CN.4/34, A/CN.4/48.

[10] A/CN.4/SR.96, para. 138.

[11] See *e.g.*, A/CN.4/SR.81, para. 83 (Mr. Hudson); A/CN.4/SR.96, p. 30 (Messrs. Brierly, Hudson).

[12] A/CN.4/34 (2nd Report), Part 2.

[13] Resolution 487 (V) of December, 1950. Further study by the Secretary-General was requested by the Resolution of February 1, 1952, after the General Assembly had considered his first report, A/1934.

[14] A/CN.4/13 (1st Report), paras. 16, 19.

[15] A/CN.4/18; A/CN.4/46. See A/CN.4/34 (2nd Report), Part 6, Chap. 2. Further discussion was adjourned from the third to the fourth session.

[16] Here tentative texts on ten articles have been provisionally agreed upon (A/CN.4/L.28). A report on the remaining portions of the law of treaties will be submitted by the Special Rapporteur in 1952 (A/CN.4/48 (3rd Report), para. 75).

[17] A/CN.4/48 (3rd Report), Chap. 7 and Annex.

Two other topics were subsequently also given priority, but on them study has only just begun. These are the regime of territorial waters and 'nationality, including statelessness'. In view of the lack of success of the Hague Codification Conference in codifying these two subjects, it may legitimately be wondered whether the work of codification on these two topics would not also transform itself into one of progressive development of international law.

Work was also initiated at the first session on the 'right of asylum',[19] but consideration of the matter appears to have been adjourned to the Greek calends.

On the borderline between codification and progressive development of international law are the various special assignments from the General Assembly. On this score, the Commission has completed a fourteen article Draft Declaration of Rights and Duties of States,[20] formulated the 'principles of international law recognised in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal',[21] and drawn up a 'Draft Code of Offences against the Peace and Security of Mankind'.[22] These have now been circulated to the various governments.

While the Commission does not favour the creation of a criminal chamber of the International Court of Justice, it gave as its opinion that the establishment of an international criminal tribunal was both desirable and possible.[23] In its Report to the General Assembly covering its third session, the Commission had to admit failure to agree on the definition of aggression,[24] although aggression is the cardinal offence in the Commission's draft Code of Offences against the Peace and Security of Mankind. The Sixth Committee of the General Assembly spent eighteen meetings in 1952 trying to find a definition but equally failed[25] and the General Assembly has now included the problem of defining aggression in its agenda for the seventh session.[26]

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[18] See A/CN.4/48 (3rd Report), para. 78. The drafts are issued under Article 16 (*g*) of the Statute, and not Article 21. See also A/CN.4/SR.63, para. 8; A/CN.4/SR.130, para. 11,

[19] See A/CN.4/13 (1st Report), para. 23.

[20] A/CN.4/13 (1st Report), Part 2.

[21] A/CN.4/34 (2nd Report), Part 3.

[22] A/CN.4/48 (3rd Report), Chap. 4.

[23] A/CN.4/34 (2nd Report), Part 4.

[24] A/CN.4/48 (3rd Report), Chap. 3.

[25] Meetings 278th–295th, *i.e.*, January 5–22, 1952. See Report of the Sixth Committee, A/2087.

In the same report is contained the Commission's study of the question of reservations to multilateral conventions 'both from the point of view of codification and from that of the progressive development of international law',[27] which may be said to be the Commission's most solid contribution in its three years of existence, even though its sound advice on this point of international law has been disregarded by the General Assembly.[28]

The term of three years was first proposed for the office of the members of the Commission, not because it was considered as the most suitable in the long run, but because three years would constitute a convenient 'experimental period' after which the whole project might be reviewed.[29] In reviewing the Commission's work, if this paper may at times appear critical it can only be because of the importance of the function which the Commission is called upon to fulfil and the desire to help find the way for the future. In fact members of the Commission themselves during its meetings have often voiced dissatisfaction with the results so far achieved,[30] and the Commission has gladly embraced the General Assembly's invitation to 'review its Statute' and suggest revisions which would 'enable the Commission to achieve rapid and positive results'.[31] But perhaps, as Mr. Spiropoulos has observed, 'it was not the provision of the Statute that prevented the work from proceeding',[32] at least not entirely, for as Mr. Scelle, another member of the Commission, has remarked, 'The important thing was . . . the matter [manner] in which the work of the Commission was organised'.[33]

CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

The study of the methods most suitable for attaining the object of the Commission was essentially the task of the Committee on the Methods for Encouraging the Progressive Development of International Law and its Codification.[34] There was at the time much discussion of the exact relationship between codification and the progressive development of international law.

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[26] Resolution of January 31, 1952.

[27] A/CN.4/48 (3rd Report), Chap. 2.

[28] Resolution of the General Assembly of January 12, 1952 on Reservations to Multilateral Conventions (see 12 *United Nations Bulletin* (1952), pp. 140–143).

[29] Cf. Report of the Committee on the Methods for Encouraging the Progressive Development of International Law and its Eventual Codification, A/AC.10/51, para. 6.

[30] See *e.g.*, A/CN.4/SR.96, para. 114 (Mr. Hudson); A/CN.4/SR.97, para. 31 (Mr. François); A/CN.4/SR.112, paras. 42, 43 (Mr. Amado).

[31] A/CN.4/48 (3rd Report), Chap. 5.

[32] A/CN.4/SR.129, para. 87. See also A/CN.4/48 (3rd Report), para. 71.

[33] A/CN.4/SR.129, para. 76.

The Memorandum submitted by the Secretary-General of the United Nations, entitled 'Survey of International Law in relation to the work of Codification of the International Law Commission',[35] a document used extensively by the Commission in its first sessions, opened with a discussion of this subject and laid strong emphasis on the legislative aspect of codification. Much prominence was given to the following excerpt from a report by Mr. Brierly. The Memorandum said:—

> 'The discussions of the Committee on the Progressive Development of International Law and its Codification of May 12–June 17, 1947, revealed general agreement on this aspect of the subject. In the statement made on May 20, 1947, the Rapporteur of the Committee, Professor Brierly, expressed full approval of the view that codification cannot be limited to declaring existing law. He said:—
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> '"As soon as you set out to do this, you discover that the existing law is often uncertain, that for one reason or another there are gaps in it which are not covered. If you were to disregard these uncertainties and these gaps and simply include in your code rules of existing law which are absolutely certain and clear, the work would have little value. Hence, the codifier, if he is competent for his work, will make suggestions of his own; where the rule is uncertain, he will suggest how it can best be filled. If he makes it clear what he is doing, tabulates the existing authorities, fairly examines the arguments pro and con, he will be doing his work properly. But it is true that in this aspect of his work he will be suggesting legislation—he will be working on *lex ferenda,* not the *lex lata*—he will be extending the law and not merely stating the law that exists" (A/AC.10/30, p. 3)'.[36]

However, perhaps it would be only fair to the Rapporteur to point out what he said immediately after the above quotation which was omitted from the Memorandum:—

> 'But it does not follow from this fact that codification necessarily

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[34] See above, note 1.

[35] A/CN.4/1/Rev.1.

[36] A/CN.4/1/Rev.1, p. 3. For reliance by members of the Commission on this excerpt, see *e.g.,* A/CN.4/SR.2, pp. 6–7, 13.

involves a certain measure of developing the law by legislation, that, therefore, legislation and codification are merely two names for the same process. The difference may be one of degree only, but it is important all the same, and it may well be, and I submit that it is in this case, that in codification, which is primarily though not exclusively concerned with stating the *existing* law, one method is the most useful, and that in legislation, where the question what is the existing law is unimportant and the aim is to create law in the future as it ought to be, another method of working is to be preferred '.[37]

The very fact that the Committee recommended, and the General Assembly ultimately decided, that the Statute of the Commission should contain very different procedures for the progressive development of international law and for codification shows that the general feeling was reflected in the passage of the Rapporteur's statement which was omitted from, rather than in that which was quoted in, the Memorandum.[38]

The Memorandum rightly pointed out that there was a direct connection between this difference in approach and the criterion of selection of topics for codification.[39] According to the Memorandum, 'the decisive criterion must be not the ease with which the task of codifying any particular branch of international law can be accomplished, but the need for codifying it '.[40] The exact extent to which this rather categorical advice influenced the members of the Commission would no doubt be difficult to determine, but it suffices to point out that the Memorandum served as the basis of discussion for the selection of topics for codification by the Commission,[41] and that the Commission's choice of subjects, in so far as any general criterion is discernable,[42] appears to have been based more on the importance of the topic rather than on its codification being realisable.[43]

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[37] A/AC.10/30, p. 3. This statement was made by the Rapporteur to amplify paras. 10 and 11 of his Memorandum, A/AC.10/26, where he said: ' 11. There seems to be general agreement in the Committee that this is a twofold task—since the development of the law looks primarily to the law as it should be, whilst the codification is primarily concerned with the law as it is '.

[38] Cf. also Mr. Jessup in the Committee on Progressive Development of International Law: 'The Committee had already established this distinction based on the idea that development dealt with that part of international law for which there were, as yet, no rules, or very few rules, whereas, codification could only be undertaken in areas where there was extensive State practice ' (A/AC.10/SR.14, pp. 7–8).

[39] A/CN.4/1/Rev.1, p. 11 *et seq.*

[40] A/CN.4/1/Rev.1, p. 13.

[41] See A/CN.4/SR.3, p. 21; A/CN.4/SR.4, p. 8 *et seq.*

[42] Cf. below, p. 263.

There is no need here to speculate on the long-term effects of such an approach.[44] The practical result is that after three years, in the fields of codification proper, the Commission has arrived at no more than provisional agreement on ten articles on the law of treaties.[45]

A perusal of the documents and records of the Commission shows that apparently only a few of the members 'thought that the Commission should be careful not to confuse its two tasks, namely the codification of international law and the progressive development of international law. The Commission's main task was codification, which must always relate to the law in force. . . . As for the protection of humanity's major interests, that . . . could not be ensured by international codification'.[46] 'Generally speaking', as Mr. Brierly, Chairman of the third session, concluded, 'the members of the Commission were of the opinion that the distinction between progressive development and codification should be minimised or attenuated'.[47] Indeed there seems a tendency to be more concerned with improving existing international law than with its codification, and to feel much more at ease in doing so.

Thus, at the sixty-fifth meeting of the Commission, Mr. Scelle, the Chairman, congratulated the Commission on the valuable work it had just accomplished and found it gratifying that 'the Commission had got out of the rut of mere codification to which it frequently allowed itself to be confined'.[48] The Commission was at that moment engaged on one of its topics for codification, the regime of the high seas, and was considering paragraph 17 of the Report on the High Seas: 'Policing of Fisheries'.[49] Despite the repeated observation of the Special Rapporteur,

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[43] See *e.g.*, A/CN.4/SR.2, p. 11; A/CN.4/SR.4, p. 13.

[44] See the present writer's 'General Principles of Law as a Subject for International Codification' (1951) 4 *Current Legal Problems,* p. 35 *et seq.*, at pp. 36, 53.

[45] See above, note 16. On the regime of the high seas, the Special Rapporteur (Mr. François) reported: 'Most of the questions were not yet ripe for codification', A/CN.4/SR.63, para. 1.

[46] A/CN.4/SR.69, para. 136 (Mr. Spiropoulos). The same speaker also at A/CN.4/SR.64, para. 74; A/CN.4/SR.97, para. 151. See also A/CN.4/SR.97, para. 141 (Mr. François).

[47] A/CN.4/SR.97, para. 149. See also para. 133 *et seq.*

[48] A/CN.4/SR.65, para. 89.

[49] A/CN.4/17, para. 17; A/CN.4/SR.65, para. 53 *et seq.*

Mr. François, that the paragraph in question was intended to deal with the legal position of States supervising fishing grounds in pursuance of treaties and not with the protection of fisheries which came under paragraph 19 of the Report,[50] the discussion switched quickly to one concerned with the conservation of marine resources 'in the interests of mankind'. This led the Commission eventually to propose the two articles on 'Resources of the Sea' in its 'Draft Articles on the Continental Shelf and Related Subjects' presented to the General Assembly in its third Report.[51] Thus 'out of the rut of mere codification' the Commission plunged itself into the task of progressive development of international law.

The real effect of the two proposed articles amounts, however, to no more than a recommendation that the various States concerned should come to an agreement concerning the conservation of marine resources and that, if they fail to come to any agreement, they should nevertheless agree to allow an international body to agree for them. Apart from the question, as one of the members of the Commission wondered, whether recommendations could be included in a code, or a draft code,[52] the Commission's recommendation hardly carries matters any further. Furthermore, from the legal point of view, two points in particular seem to require further consideration.

First, by attributing, apparently, to any such agreement reached by the States concerned an effect *erga omnes*,[53] the proposal seems to be contrary to one of the fundamental principles of international law, *pacta inter alios nec prosunt nec nocent*.

Secondly, by granting a special right of protection to coastal States situated within 100 miles of the fishing grounds,[54] the proposal appears to be contrary to the rule applied in the *Fur Seal Arbitration* (1893) between Great Britain and the United States in which it was held that: '*The United States has not any right of protection* or property in the fur-seals frequenting the islands of the United States in [the] Behring Sea, when such seals are found *outside the ordinary three-mile limit*'.[55]

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[50] A/CN.4/SR.65, paras. 54, 56, 59.
[51] A/CN.4/48, Annex, Part 2, Articles 1 and 2.
[52] A/CN.4/SR.69, para. 56 (Mr. Spiropoulos).
[53] Note particularly the last sentence of the proposed Article 1. See A/CN.4/SR.119, paras. 50, 51; A/CN.4/SR.65, para. 60 *et seq.*
[54] Article 1. See further, explanatory note thereto, para. 5.

In the *Fur Seal Arbitration,* after the United States discovered that some of the translated documents on which its case mainly rested were incorrect,[56] it contended that one of the *raisons d'être* of its right of protection and of property over the seals in the Behring Sea was 'the preservation and increase of the useful product of the earth, in order to furnish an adequate supply for the constantly increasing demands of civilised society. This right, or almost duty, falls upon the coastal State'.[57] 'It is where there is a natural advantage, within a certain proximity to the coast of a particular nation, which it can turn to account better than the citizens of any other nation. In such cases, if the particular nation is permitted to establish and carry out a system of national regulation, it may furnish a regular, constant supply of a product of the seas for the uses of mankind, which product, if it were thrown open to the whole world, would be destroyed'.[58]

It is more or less upon the same considerations, which were not sustained by the Fur Seal Arbitration Tribunal, that the International Law Commission now bases[59] its proposed articles on the 'continental shelf'.[60] However, Lord Asquith, Umpire in a recent arbitration between *The Petroleum Development (Trucial Coast), Ltd.* and *The Ruler of Abu Dhabi* (1951), found 'much cogency on [*sic*] the arguments of those who advocate the *ipso iure* variant of the doctrine'[61] of the continental shelf, which underlies the Commission's draft articles, although he held expressly that neither the doctrine itself nor the Commission's draft reflected the position of existing international law.[62]

While, in the case of the 'continental shelf', the Commission proposes to confer upon the coastal State a right which it does not have under existing international law; in the case of sedentary fisheries the Commission proposes, in contrast, to limit the right of the coastal State which it now enjoys under existing international law. It compels the coastal State to open such sedentary fisheries as are situated outside its territorial waters to foreign citizens on an equal footing with its own nationals.[63]

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[55] Moore, *International Arbitrations,* Vol. 1, p. 755 *et seq.,* at p. 949. Italics added.

[56] *Loc. cit.,* p. 814 *et seq.*

[57] *Loc. cit.,* p. 835.

[58] *Loc. cit.,* pp. 865–866.

[59] Cf. *e.g.,* A/CN.4/SR.66, para. 73 (Mr. Hudson): 'Lawyers had no right to prevent the exploitation of those [submarine] resources for the benefit of mankind. The Commission . . . should consider in what way it could adapt rules of international law to the requirements of humanity'. See also A/CN.4/SR.69, para. 135 (Mr. Cordova). However, as Mr. Amado so truly pointed out, 'The exploitation in question was mainly carried out for pecuniary gain', A/CN.4/SR.131, para. 13.

[60] A/CN.4/48 (3rd Report), Annex, Part 1.

[61] (1952) 1 *International and Comparative Law Quarterly* 247, at p. 256.

[62] *Ibid.,* pp. 256, 258. See L. C. Green, 'The Continental Shelf', (1951) 4 *Current Legal Problems,* p. 54.

The example of the 'regime of the high seas' drifting from codification to progressive development of international law is unfortunately one which, it is feared, might possibly be followed by others. In the law of treaties there are already signs of a tendency to improve the law,[64] which resulted during the third session in inserting a new article in the draft code obliging States which had signed treaties requiring ratification to submit them within a reasonable time to the competent authorities for ratification.[65] This was, however, deleted in 'second reading'.[66] As for the codification of arbitral procedure, the two reports which have been prepared,[67] in the words of the Special Rapporteur himself, 'propose the adoption of procedures which, while not really new, comprise unprecedented adaptations of traditional procedure'.[68] Mr. François observed during the discussion: 'A scheme as perfect as the one Mr. Scelle proposed establishing ran the risk of remaining a dead letter'.[69]

It is true, as members of the Commission have sometimes been reminded, that its work need not always result in a convention to be agreed to by States.[70] Yet it is to be wondered whether the Commission will be really fulfilling its intended function or whether its prestige will be enhanced if the bulk of its work results in a series of declarations *de lege ferenda* as mere 'common standards of achievement for all peoples and all nations' without, however, any immediate prospect of their being respected. It is submitted, with deep respect, that the work of the Commission would only gain by a greater distinction being made than hitherto between its functions of codification and of progressive development of international law, and by more attention being devoted to the former.

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[63] A/CN.4/48 (3rd Report), Annex, Part 2, Article 3. See L. C. Green, *loc. cit.*, p. 64 *et seq.* It seems that at the initial stage of the discussion at least, some members did not strictly distinguish 'sedentary fishery' from ordinary fishing on the high seas, see *e.g.*, A/CN.4/SR.66, paras. 10 and 28 (Mr. Cordova).

[64] *E.g.*, A/CN.4/SR.78, para. 49; A/CN.4/SR.100, paras. 86, 100, 115, 141.

[65] A/CN.4/SR.87, paras. 1–43; A/CN.4/SR.88, paras. 89–117.

[66] A/CN.4/SR.100, paras. 106–119.

[67] A/CN.4/18, A/CN.4/46.

[68] A/CN.4/46, p. 5.

[69] A/CN.4/SR.73, para. 62.

[70] See A/CN.4/SR.2, p. 9 (Mr. Liang, Secretary); A/CN.4/SR.4, p. 18 (Mr. Kerno, Assistant Secretary-General). Cf. below, p. 272.

In this connection, it may be observed that where the Commission has followed this line it has achieved its greatest result, namely, on the subject of reservations to multilateral treaties. It may be recalled that on May 28, 1951, the International Court of Justice, at the request of the General Assembly, gave an Advisory Opinion on the admissibility of *Reservations to the Convention on Genocide*.[71] Paradoxically, it fell upon the International Law Commission, which was at the same time asked by the General Assembly 'to study the question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law' (Resolution 478 (V)), to show—even though obliquely—that the rule as stated in the Advisory Opinion of the Court was not in conformity with past practice[72] and 'is not suitable for application to multilateral conventions in general'.[73] The Commission rightly pointed out that the rule as admitted by the Court which, with certain modifications, resembled the so-called Pan-American system, while it did not in fact possess the alleged advantage of inducing ratification, tended to 'split up a multilateral convention into a series of bilateral conventions and thus to reduce the effectiveness of the former'.[74] It had the further disadvantage of rendering the status of the reserving State in relation to the convention uncertain and sometimes throwing in doubt even the status of the convention itself.[75]

The Commission reaffirmed the rule, hitherto generally recognised, that 'the tender of a reservation constitutes, in substance, in so far as relations with the reserving State are concerned, a proposal of a new agreement, the terms of which would differ from those of the agreement embodied in the text of the convention. Such a new agreement would require acceptance by all the States concerned '.[76] The conclusions which the Commission submitted to the General Assembly were based on this well-established rule, except on two minor points where the Commission suggested *de lege ferenda* a more liberal interpretation of the term 'States concerned' and a provision to prevent any abuse of such an interpretation.[77] These suggestions appear to constitute reasonable bases for agreement.

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[71] *I.C.J. Reports 1951*, p. 15.
[72] A/CN.4/48 (2nd Report), para. 28.
[73] *Ibid.*, para. 24.
[74] *Ibid.*, para. 22.
[75] *Ibid.*, para. 24.

It is on this topic that the Commission seems to have struck the happy mean between the existing law and the progressive development of international law, as suggested by the Rapporteur of the Committee on the Progressive Development of International Law,[78] and it is on this score that the Commission has made its most useful contribution so far. It would appear that if the same line were to be followed in future, further valuable work will yet come from that eminent body.

THE COMMISSION AT WORK

In regard to the codification of international law, the procedure to be followed by the Commission is prescribed in Chapter 2 (*b*) of its Statute. The first provision under this heading, *viz.*, Article 18, enjoins that '1. The Commission shall survey the whole field of international law with a view to selecting topics for codification, having in mind existing drafts whether governmental or not. 2. When the Commission considers that the codification of a particular topic is necessary or desirable, it shall submit its recommendations to the General Assembly'.

At the very outset, the Commission was confronted with the task of applying this provision, the key to its subsequent work of codification. A divergence of opinion existed in the Commission on the interpretation of this article, the whole extent of which is perhaps not clearly discernible in the Commission's Report. While some members considered that there should be a thorough survey which, if necessary, might occupy the first two sessions of the Commission,[79] others considered that 'the selection of topics should be started immediately. All the members of the Commission were thoroughly acquainted with the whole field of international law; a new survey by the Commission would therefore be unnecessary'.[80] The latter view prevailed and, altogether, the Commission spent about nine hours [81] in its survey of the whole field of international law and in its selection of suitable topics for codification, relying largely upon the survey prepared by the Secretariat of the United Nations. The preparatory work done by the Secretariat, it is submitted, can hardly relieve the Commission from itself discharging, for the sake of quick results, one of the tasks which is specifically entrusted to it by its Statute.

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[76] A/CN.4/48 (2nd Report), para. 29.

[77] *Ibid.*, paras. 29, 30.

[78] Above, p. 255.

[79] A/CN.4/SR.3, p. 17 (Mr. Koretsky); see also A/CN.4/SR.2, p. 6 (Mr. Alfaro).

What are the methods or criteria whereby the Commission selected the various 'suitable' [82] topics the codification of which it considered as 'necessary or desirable'? The need of establishing some common criteria before proceeding to the actual selection was pointed out by some members,[83] but a different procedure found favour with the majority of the Commission, who wished to proceed immediately to the selection of the various topics for codification trusting that the common criteria would automatically emerge in the process.[84] The reason for thus putting the cart before the horse was apparently that 'each member of the Commission had his own personal views in regard to the criteria'.[85] In view of this and the actual record of its proceedings, it does not seem that the following stricture by one of its members on the Commission's selection of topics for codification is entirely unwarranted: 'Its selection had been guided by intuition, scientific considerations and the personal experience of its members rather than by objective realities'.[86]

A similar desire to achieve rapid results appears in the Commission's interpretation of Article 18, paragraph 2, of its Statute.[87] While at first there existed a genuine divergence of opinion as regards the proper interpretation of that provision for lack of sufficient interpretative material at the disposal of the Commission—what was available being ambiguous[88]—ample explanation was later provided by one of the members of the Commission, Mr. François, who was the Rapporteur of Sub-Committee 2 of the Sixth Committee of the General Assembly which had drafted the provision in question.[89] It was then made clear that the intention was that the Commission should not proceed under Articles 19 to 23 of the Statute unless its recommendations to the General Assembly on the selection of topics for codification had first been approved. The idea was that the choice should depend ultimately upon a political organ representing the members of the United Nations, acting upon the advice of a body of experts, but not upon the latter alone.[90] However, the Commission by ten votes to three decided otherwise.[91]

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[80] A/CN.4/SR.4, p. 13 (Mr. Alfaro); see also A/CN.4/SR.2, p. 12 (Mr. Spiropoulos); A/CN.4/SR.3, p. 21 (Messrs. Spiropoulos, Hudson).

[81] Meetings 4–7; only meetings 5 and 6 were fully devoted to the survey. The meetings were in the afternoon from 3–6 p.m.

[82] See French text of Article 18, para. 1.

[83] A/CN.4/SR.4, p. 14 (Mr. Amado); see also Mr. Hudson, *ibid.*

[84] A/CN.4/SR.4, p. 15 (Mr. Scelle); see also Messrs. Sandstrom and Hudson, *ibid.*

[85] *Ibid.* Cf. also A/CN.4/SR.2, p. 12 (Mr. Spiropoulos): 'Most of the topics were at the same stage of codification. It was therefore a matter of personal opinion whether or not it was necessary or desirable to codify any of them'.

[86] A/CN.4/SR.7, p. 2 (Mr. Koretsky).

[87] A/CN.4/13 (1st Report), paras. 9–12.

The haste with which the Commission proceeded with its spade work, and the liberal manner in which it interpreted its own Statute, tend largely to stultify the methods devised in the Statute of the Commission to avoid a repetition of the failure of the League codification effort and thus to deprive them of a fair trial. Indeed, the records of the Commission fail to reveal well-defined methods of work.

From the very beginning the Commission did not consider it necessary to draw up a 'general plan of codification',[92] one of the reasons being that 'the Commission must produce concrete results as soon as possible'.[93] And in regard to the codification of individual subjects, the Assistant Secretary-General of the United Nations, Mr. Kerno, apparently felt it necessary to remind the Commission at its ninety-seventh meeting during the third year of the Commission's existence that: 'Article 19 [of the Statute of the Commission] which is liable to be overlooked provided that "the Commission shall adopt a plan of work appropriate to each case"'.[94]

The task which is thus incumbent upon the Commission itself has apparently been left entirely to the Special Rapporteurs appointed to study the various subjects for codification. Generally speaking, upon the shoulders of the various Rapporteurs an extraordinary amount of work and responsibility seems to have been placed,[95] even though they have the valuable assistance of the Secretariat. So far it seems that the lack of specific directives, whether uniform to all cases or appropriate to each, has resulted in the reports on the three subjects for codification being all drawn up in different ways.[96] Thus the report on the law of treaties dealt with only a portion of the subject and contained precise draft texts.[97] The report on the regime of the high seas was only a general survey of the subject,[98] while the report on arbitral procedure, although it contained draft texts on the whole range of the subject, formulated them as general conclusions rather than as provisions in a draft code.[99]

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[88] See *e.g.*, A/CN.4/SR.3, pp. 2–3; the Secretary of the Commission (Mr. Liang) reported that no record of the deliberation of Sub-Committee 2 of the 6th Committee existed other than the statements found in the footnote to A/CN.4/1/Rev.1, para. 106.

[89] A/CN.4/SR.3, pp. 3–6.

[90] See also A/CN.4/SR.3, pp. 8–9 (Mr. Hsu).

[91] See A/CN.4/13, para. 12; A/CN.4/SR.4, p. 7.

[92] A/CN.4/13 (1st Report), para. 14.

[93] A/CN.4/SR.4, p. 12 (Mr. Scelle) and p. 14 (Mr. Scelle).

[94] A/CN.4/SR.97, para. 165.

The Secretariat has done very useful work in compiling bibliographies and in preparing various memoranda on the different subjects under study by the Commission, but it may still be wondered how well prepared, briefed and documented are, in fact, all the members of the Commission who foregather each summer for two months in Geneva on each and all the subjects to be discussed at that session. One of the members, Mr. Cordova, declared that 'under the present system, a few days before the beginning of each session the members of the Commission received a report they had never set eyes on before'.[1] At its third session the Commission decided, in dealing with the second Report on the regime of the high seas, to begin with the chapter on the continental shelf.[2] A complete collection of documents on the subject was being prepared by the Secretariat, but owing to printing delays, had not yet reached the members of the Commission,[3] who regretted 'having been compelled thus far to discuss that important question without the help of all the relevant documentation'.[4] But since the date of publication was delayed beyond the date of closure of the third session,[5] it would appear that the Commission nevertheless succeeded in drafting the relevant articles on the subject presented in its third Report without the assistance of this documentation. The same would seem to apply to the drafting of articles on sedentary fisheries, since on that subject also it was remarked that 'the Commission had insufficient information'.[6] In the latter case it was proposed that the 'text should be submitted to governments, who would not fail to protest, if necessary'.[7] Such conditions and methods of work can hardly be called the most satisfactory and no doubt leave room for improvement.

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[95] Cf. A/CN.4/48 (3rd Report), para. 65.
[96] Cf. A/CN.4/SR.63, para. 57.
[97] See A/CN.4/23; A/CN.4/43.
[98] See A/CN.4/17; A/CN.4/42; A/CN.4/SR.63, paras. 1 and 54.
[99] See A/CN.4/18; A/CN.4/46.
[1] A/CN. 4/SR.129, para. 67.
[2] A/CN.4/SR.103, para. 139.
[3] A/CN.4/SR.113, para. 39.
[4] A/CN.4/SR.117, para. 1 (Mr. Hudson).

Finally, the periodic re-election of the members of the Commission under the existing system tends to disrupt the work of the Commission. There is much force in the view that 'it was not practical to initiate a study which would be completed by a Commission composed of different members'.[8] Consequently towards the end of the three year term there is a natural tendency to attempt to finish the study of all the subjects which have been undertaken and to avoid initiating any new studies.[9] This cannot, however, always be timed with strict accuracy. Before the term of office of the present members of the Commission was extended by the General Assembly, there was thus a time when the Assistant Secretary-General, Mr. Kerno, felt compelled to say that 'the Commission's uncertainty in that regard should not result in its complete inactivity in the interval between its third and fourth sessions . . . The Commission should . . . not allow itself to sink into inertia'.[10]

It would seem from the above that there is room for greater thoroughness in the planning and preparation of the work of the Commission, from the standpoint both of organisation and of substance.

METHODS OF APPROACH

Much has been said to warn members of the Commission that they must beware of working in an ivory tower and this has been adduced sometimes as an argument against the Commission being composed of full-time members sitting at a fixed centre.[11] The walls of an ivory tower are, however, more intellectual than environmental. The problem is surely one of securing initially the right persons for the task, from the point of view both of learning and of approach.

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[5] See A/CN.4/SR.117, para. 2.

[6] A/CN.4/SR.120, paras. 35 (Mr. Cordova) and 40 (Mr. Kerno).

[7] A/CN.4/SR.120, para. 57 (Mr. Amado).

[8] A/CN.4/SR.71, para. 8 (Mr. François).

[9] Cf. A/CN.4/SR.71, paras. 67, 71, 81 and A/CN.4/SR.124, para. 33. The Commission was afraid to appoint a rapporteur for fear that he might not be re-elected.

[10] A/CN.4/SR.71, para. 85. See also A/CN.4/SR. 124, para. 35.

In a Memorandum submitted by the Secretary-General of the United Nations entitled the 'Ways and Means of Making the Evidence of Customary International Law More Readily Available',[12] it was pointed out that in the field of international law 'there is a growing trend towards an inductive approach and that greater reliance is being placed on materials illustrating State practice'.[13]

The Statute of the International Law Commission itself reflects this trend. Articles 24, 19 (2), and 20 all go to show the importance attached to State practice. It seems clear that it is intended that the Commission should seriously consider the best means of making more readily available the evidence of State practice so that international law may be inductively studied more easily, that at the same time the Commission in its work of codification should through its own research and through detailed requests to the various governments obtain all the necessary data relevant to the subjects being studied, and that the conclusions of the Commission should be based upon such evidence. In other words, the Statute prescribes the inductive approach for the Commission and charges it to study means for facilitating the use of the inductive approach in general.

The Commission so far does not seem to have followed any particular approach. Its recommendations to the General Assembly on making the evidence of customary international law more readily available are timid and, for that reason, disappointing.[14] Nothing has been suggested that is calculated to make available the vast amount of materials in the archives of the various governments, beyond calling their attention to the desirability of publishing digests. Inducements in the form of subventions might have been suggested. In particular it is a pity that a modest suggestion of Mr. Hudson, Chairman for the first session, that the United Nations Secretariat should consider publication of a repertoire of treaties,[15] which would have been very useful, was not adopted by the Commission.

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[11] See *e.g.*, A/CN.4/SR.97, para. 30.

[12] A/CN.4/6.

[13] Page 114.

[14] A/CN.4/34 (2nd Report), Part 2.

The Commission has so far made little progress with Article 19 (2) of the Statute, but the fault may not perhaps lie entirely with the various chancelleries. Typical, though perhaps more outspoken than others, is the reply from the French Ministry of Foreign Affairs :—

> 'In Your letter No. LEG 291/OL/YLL, you requested me, in conformity with Article 19, paragraph 2, . . . to furnish the Commission with the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to: (1) treaties, (2) arbitral procedure, and (3) the regime of the high seas. I have the honour to inform you that the French Government unfortunately cannot consider communicating all the documentary material which has appeared on these three classic topics, representing as it does several tons of its archives. It is, however, prepared to supply the Commission with such of these texts as it possesses and *as are requested in conformity with Article 19, paragraph 2*'.[16]

The last part of the French reply alludes, it may be, to the fact that Article 19 (2) speaks of 'a detailed request'.

This initial setback appears to have had an unfortunate effect upon the members of the Commission. In the course of its proceedings some doubted 'whether satisfactory results would be obtained by sending a questionnaire to governments. Generally speaking, governments did not reply to questionnaires or sent replies which were of little use'.[17] The Commission was thus denying itself of one of the most important instruments placed at its disposal by the Statute in its work of codification.

If the Commission continues its present methods, it is to be feared that it might not be able eventually to comply faithfully with Article 20 (*a*) of the Statute which prescribes that the draft codes of the Commission should be submitted to the General Assembly together with a commentary which contains 'adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine'. The presentation of such materials in the various drafts now still under study does not appear to be altogether adequate. Even if additional materials were added to the final version of the commentary, it might still be wondered whether the spirit, as well as the letter, of the provision would have been complied with; for, no doubt, the intention is that such materials should be the bases of the Commission's study and not the adornments of its conclusions.

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[15] A/CN.4/16, para. 76.

[16] A/CN.4/19, p. 27. Italics added. See also p. 26, the Danish reply; p. 67, reply of the United Kingdom.

[17] A/CN.4/SR.63, para. 15 (Mr. Alfaro). See also paras. 4 (Mr. Hudson), 13 (Mr. Hsu).

In this connection attention may be drawn to a remark of one of the Commission's members, Mr. Yepes, during the first reading of the draft Code of Offences against the Peace and Security of Mankind. 'He thought that the commentaries accompanying the articles of the code were extremely brief. Their conciseness might well come as a surprise to the reader if he compared them, for example, with those of the Harvard draft. He thought that it would enhance the prestige of the Commission if they were expanded somewhat and would like to make that suggestion to the Rapporteur'.[18] The latter, Mr. Spiropoulos, replied: 'The draft Code was not a doctrinal thesis but an official document'.[19]

It may be asked if a more extensive adoption of the inductive approach to international law and to the international society in which the law operates would not be more conducive to positive results. In other words, it is suggested that more attention should be paid to both the law-determining agencies[20] and the field-determining agencies[21] of international law. The former should assist the Commission in its work of codification, the latter in its work of progressive development of international law.

The following passage in the Commission's Report covering its second session suggests that the Commission does not quite appreciate the distinction in Article 38 of the Statute of the International Court of Justice between the sources of international law and law-determining agencies: 'Article 24 of the Statute of the Commission seems to depart from the classification in Article 38 of the Statute of the Court, by including judicial decisions on questions of international law among evidence of customary international law'.[22] In fact the Statute of the Commission is perfectly consonant with the Statute of the Court in this respect. It would appear that it is the Commission which has erroneously interpreted Article 38 of the Statute of the Court by considering that paragraph 1 (*d*) of that article also indicates sources of international law, while a closer study would show that it only indicates some of the law-determining agencies: judicial decisions and the writings of the most highly qualified publicists. These serve as 'means for the determination of rules of law' and, in contradistinction to sources of international law which are indicated by paragraphs 1 (*a*), (*b*) and (*c*) of Article 38, cannot create new rules governing the relations between States.

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[18] A/CN.4/SR.92, para. 113.

[19] *Ibid.*, para. 115.

[20] See G. Schwarzenberger, *International Law*, Vol. 1, 1949, p. 8 *et seq.*

[21] See G. Schwarzenberger, 'The Frontiers of International Law', (1952) 6 *Year Book of World Affairs*, p. 246 *et seq.*, at p. 265 *et seq.*

A more cogent realisation of this distinction and the scientific use of international law-determining agencies in accordance with a system of hierarchy may be found useful in the Commission's task of codification; for this would greatly facilitate the establishment of the existing law and, as a corollary, the distinction between *lex lata* and *lex ferenda*.

A more cogent realisation of this distinction may perhaps also bring home the knowledge that rules propounded by authors in their writings, however lofty in ideal or persuasive in argument, unless they are received into positive law either by the consent of States as expressed in treaties, or by general practice hardened into custom, have no force whatever in the international sphere. As one of the Commission's members Mr. Amado rightly pointed out, 'international law was made up of custom and agreement and could not be created out of scientific opinions'.[23] But the Assistant Secretary-General, Mr. Kerno, the Chairman for the second session, Mr. Scelle, and two other members of the Commission, Messrs. Yepes and el Khoury, there and then disagreed with him and maintained that the International Law Commission had the authority to create law.[24] Although it is true that Article 23 of the Statute of the Commission prescribes various procedures whereby a report of the Commission on a subject of codification may be dealt with, yet the proper value of a report which is not transformed into a convention is, in the words of Mr. Amado, that of a 'subsidiary means for the determination of rules of law, according to sub-paragraph (*d*) of the first paragraph of article 38 of the Statute of the International Court of Justice'.[25]

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[22] A/CN.4/34, para. 30.

[23] A/CN.4/SR.69, para. 76.

[24] A/CN.4/SR.69, para. 71 *et seq.* See also below, note 26.

It is not believed that members of the Commission as a whole ever conceived themselves as the Solons of the world endowed with an omnipotent legislative power to right the wrongs of the world.[26] But even as proposer of international legislation, the Commission should be well aware of what have been termed the 'field-determining agencies of international law', that is to say factors which determine the optimum functional frontiers of international law. The most important of these are the following: the degree of integration of the international society, the measure of structural uniformity of States, and the value of their ethical common denominator.[27] The scope of the functional development of international law varies according to the intensity of these field-determining agencies. A study of these field-determining agencies may be found useful in the Commission's task of progressive development of international law.

It will easily be seen that, looked at from this angle, in the present bipolarised world, the proposed formulation of the Nuremberg principles and the Draft Code of Offences against the Peace and Security of Mankind[28] far exceed the limits indicated by such field-determining agencies. The draft code treats as crimes punishable under international law the preparation, threat or commission of any act of aggression, although the Commission itself failed in its attempt to define either aggression[29] or the threat of aggression.[30] Is it truthfully expected that the present divided world would be able to come to an agreement as to the interpretation of these terms should some untoward 'incident' occur somewhere along the long line now separating the two camps, or is the interpretation to be left with the eventual victor?

It is true that in preparing these two documents the Commission was only acting under instructions from its parent body, the General Assembly, and responsibility really lies in the latter for indulging in such make-believes. However, as the Assistant

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[25] A/CN.4/SR.2, p. 10.

[26] Cf., however, A/CN.4/SR.97, para. 142 (Mr. François): 'It was proposed that the Commission be composed of such eminent personalities that members of the United Nations would be forced to accept their decisions, even against their will'. See also A/CN.4/SR.123, para. 99.

[27] See *loc. cit.*, note 21, above, p. 269.

[28] A/CN.4/48 (3rd Report), Chap. 4.

[29] A/CN.4/48 (3rd Report), Chap. 3.

[30] A/CN.4/SR.89, para. 66.

Secretary-General has reminded its members, 'the Commission was an important United Nations body, consisting of fifteen members "who shall be persons of recognised competence in international law"'.[31] Therefore, one would be inclined to agree that 'the Commission was a body which should form its own estimate of its responsibilities. It could not confine itself to inserting provisions in a code. It must exercise its judgment'.[32]

It would certainly not have been impossible for the Commission to add a comment on the value of such a code, since the Commission, although not asked to, did make a suggestion that 'pending the establishment of a competent international criminal court, a transitional measure might be adopted providing for the application of the code by national courts'.[33] It requires a certain amount of imagination to visualise national courts of the aggressor State punishing members of the government for having made preparations or threatened to commit, or for having committed acts of aggression against a foreign State.[34] In its sanguineness the suggestion surpasses even the hopeful Convention on Genocide.

If superior orders constitute mitigating circumstances in the formulation of the Nuremberg principles and the drafting of the Peace and Security Code, little excuse can be found for the captious view that the 'establishment of an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions is desirable' and 'possible'.[35] The answer to the second part of the question was apparently predicated on the specious reasoning that 'even if it were found that the establishment of the international judicial organ envisaged was not practicable or expedient at this time, this did not mean that it was not possible'.[36]

As a result of this recommendation, the General Assembly set up a Committee on International Criminal Jurisdiction charged with the duty of drafting a Statute of an international criminal judicial organ. One of the members of the Commission,

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[31] A/CN.4/SR.69, para. 75.

[32] A/CN.4/SR.75, para. 54 (Mr. Cordova). In fact, the Commission conceived its task as mere formulation in the one case, and enumeration in the other (A/CN.4/SR.100, para. 103).

[33] A/CN.4/48 (3rd Report), para. 58 (d).

[34] Cf. A/CN.4/SR.111, para. 35 and p. 3 *et seq.*

[35] A/CN.4/34 (2nd Report), para. 140.

[36] *Ibid.*, para. 139.

Mr. Amado, who participated as the delegate of Brazil on that Committee, said at its second meeting that: 'Should the latter come to an immediate decision not to discuss the question, and to inform the General Assembly that, in its opinion, the work was not timely, he would be one of the first to vote for such a commonsense, and at the same time constructive, solution'.[37] However, the Committee decided that its terms of reference required it only to elaborate concrete proposals and not to 'express an opinion as to the advisability of creating an international criminal court'.[38] So a draft Statute for an International Criminal Court was duly elaborated.[39]

Another instance in which the Commission indulged in this make-believe policy was when it excluded the laws of war from its topics for codification. The Commission's Report said: 'It was considered that if the Commission, at the very beginning of its work, were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace'.[40]

What should be a matter of greater concern to the Commission, it is submitted with great respect, is not to help public opinion keep its head in the sand or to assure the public by keeping its own head there, but to avoid the certain and almost disastrous effect upon public opinion if the Commission repeats on perhaps an even larger scale the failure of the League of Nations to codify international law.[41]

However, codification, whether national or international, is a long and arduous task. The Commission, although it has held three sessions, has sat for no more than a total of six months. While its work so far has not been all that can be desired, it has also shown signs of its capabilities. As suggested in this paper, its task may perhaps be facilitated by a more extensive application of the inductive approach, by more thorough scientific and systematic planning and preparation of its work and by a greater distinction being made between codification and the progressive development of international law.

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[37] A/AC.48/SR.2, para. 33.

[38] Report to the General Assembly, A/AC.48/4, paras. 11 and 12.

[39] See A/AC.48/4.

[40] A/CN.4/13 (1st Report), para. 18. Cf. also in a different matter, A/CN.4/SR.111, para. 86.

[41] Cf. above, note 44, p. 257.

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LEGAL ASPECTS OF THE SCHUMAN PLAN

L. C. Green

In the years following the First World War, politicians in Europe declared it to be their opinion that the complete independence of steel manufacturers freely to compete one with another was likely to lead to both political and economic disruption. At the same time, the steel manufacturers felt that cut-throat competition and fluctuations in price levels would eventually result in a breakdown in steel production. In 1926, therefore, the steel manufacturers of France, Germany, the Saar, Belgium and Luxemburg decided to establish the International Steel Cartel.[1] The original parties were soon joined by the steel manufacturers of Austria, Hungary and Czechoslovakia acting as a single group and, after a new agreement had been signed in 1933, Great Britain and Poland became members in 1935 and the United States in 1938, although in 1926 the American manufacturers had condemned the Cartel as a potential threat to the United States steel industry.[2] At that time, however, European statesmen had acclaimed it as 'a secure foundation for international economic and political co-operation',[3] while one Socialist member of the *Reichstag*, Dr. Hilferding, went so far as to describe it as an important landmark in the development of an international economy.[4]

Five years after the termination of the Second World War the Foreign Office was informed by the French Ambassador that 'the French Government propose that an authority should be created which should take over control and production of all steel and coal in Western Europe. It would not have ownership, but it would have controlling power '.[5] In a later statement it was made clear that although the plan was intended to apply to the whole of Western Europe, at first ' the French Government proposes to place Franco-German production of coal and steel as a whole under a common higher authority, within the framework of an organisation open to the participation of the other countries in Europe. The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first stage in the federation of Europe '. Here one is entitled to inquire how far economic policies govern politics, and how far political realities condition economics.[6] However, France was convinced that ' the solidarity in production thus established will make it plain that any war between France and Germany becomes, not merely unthinkable, but materially impossible '.[7]

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[1] For the general background, see *Survey of International Affairs*, 1926, p. 135; also Hexner, *The International Steel Cartel*, 1943. For the text of the Agreement, see *Survey*, p. 481; Hexner, p. 289.

[2] Hexner, *op. cit.*, pp. 225–226.

[3] *Ibid.*, pp. 220–223.

[4] Hexner, *International Cartels*, 1945, p. 107.

The German Cartel Court established in 1923 had defined a cartel as a ' contractual association of legally independent *entrepreneurs* in the same or similar field of business formed with the intent, effect, or potentiality of influencing the market by means of regulation of competition '.[8] The proposed high authority would not be such a private ' contractual association ', but an intergovernmental organisation established by treaty to control the coal and steel industries of all the member states. The French Government was at pains, therefore, to point out how the new institution would differ from a cartel : ' The proposed organisation—in contrast to international cartels, which tend to impose restrictive practices on distribution and the exploitation of national markets and to maintain high profits—will ensure the fusion of markets and the expansion of production '.[9]

In the light of this statement it is time to compare the purposes of the International Steel Cartel with those of the authority proposed in the Schuman Plan. The International Steel Cartel sought to achieve ' the establishment of a general marketing scheme for the steel export market and the establishment of agencies to administer that scheme and to amend it if necessary ;

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[5] Anglo-French Discussions regarding French proposals for the Western European Coal, Iron and Steel Industries, Cmd. 7970 (1950) Doc. 1. For background, see Schwarzenberger, *Power Politics,* 1951, p. 794 *et seq.*

[6] See, for example, Schwarzenberger, *op. cit.,* pp. 130–138.

[7] Cmd. 7970 : Enclosure to Doc. 2.

[8] Cited in Hexner, *op. cit.,* n. 1 above, p. 41.

[9] Cmd. 7970 : Enclosure to Doc. 2.

the establishment of national organisations of steel exporters who controlled the steel exports of their countries; the establishment of marketing schemes for particular steel commodities and of agencies to administer them; the establishment of quota systems determining the sharing of markets of particular steel commodities by national exporting groups; the establishment of uniform pricing systems and the restriction of non-price competition; the co-ordination of price policies among the different controlled steel products; the establishment of uniform selling conditions; the allocation of markets and customers; the stabilisation of export prices within somewhat narrow limits throughout periods of business fluctuations; the organisation of merchandising functions in important importing countries; the protection of the domestic market of each adherent; the conclusion of " penetration agreements " with steel producers of non-member countries fixing conditions under which the International Steel Cartel penetrated the markets of producers who shared their domestic steel markets with the International Steel Cartel; fighting or moderating outside competition; and the establishment of co-ordinated propaganda to promote the use of steel '.[10]

These purposes do not seem excessively different from those envisaged by the French Government in its proposals for the future of European coal and steel. ' The task with which this common higher authority will be charged will be that of securing in the shortest possible time the modernisation of production and the improvement of its quality; the supply of coal and steel on identical terms to the French and to the German markets as well as to the markets of other members' countries; the development in common of exports to other countries; and the equalisation as well as improvement of living conditions of workers in these industries. . . . To achieve these objects, starting from the very different conditions in which the productions of member countries are at present situated, it is proposed that certain transitional measures should be instituted, such as the application of production and investment schemes, the establishment of compensating machinery for equating prices, the creation of an amortisation fund. . . . (In addition, and among other measures, the) movement of coal and steel between member countries to be free of all customs duties '.[11]

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[10] Hexner, *op. cit.*, n. 4 above, pp. 205–206.

[11] Cmd. 7970: Enclosure to Doc. 2.

THE SCOPE OF THE TREATY AND THE POSITION OF THE SAAR

About a year after the delivery of the French Note to the Foreign Office, the Treaty establishing the European Coal and Steel Community,[12] envisaged in the Schuman Plan, was signed at Paris on April 18, 1951, by representatives of France, Germany, Belgium, Italy, Luxemburg and the Netherlands.

Before examining the nature of the institution established, reference should be made to the scope of the Treaty and the special arrangements concerning the Saar, which differ fundamentally from those which operated in the days of the International Steel Cartel. By Article 4 of the International Steel Cartel Agreement the votes allocated to the Saar steel manufacturers were exercised as to 1/3 by France, and as to the remaining 2/3 by Germany. In 1945, after the unconditional surrender and occupation of Germany by the four great powers, the Saar was included in the French Zone. It was soon made clear that the French intention was to integrate the Saar at least economically if not politically with France. By the end of 1946 France had secured Anglo-American agreement to such economic integration. In June, 1947, a Convention was signed between France and the Saar extending French economic and financial legislation to the Saar, and in the latter's Constitution of that year the Saar was defined as an ' autonomous, democratic and social country linked with France '. A French High Commissioner was appointed in 1948, and in March, 1950, a series of conventions was signed regulating the relations between France and the Saar. The net result of these agreements was that the Saar became a virtual dependency of France. What was more important from the point of view of the Schuman Plan was that the Saar coalfields were to all intents and purposes conveyed to France for a period of fifty years. Germany protested at the whole situation, but to no avail.[13]

According to Article 21 of the Schuman Plan Treaty, France, Germany and Italy are each entitled to eighteen delegates in the Community's Assembly. These delegates are nominated by the national parliaments from their members or are elected by direct universal suffrage, the choice as to method being solely within the discretion of the states concerned. The article expressly declares that ‘the representatives of the population of the Saar are included in the number of delegates allotted to France’. There is nothing, however, to ensure that the French Chamber—if that is the authority selected by the Government—will elect any representatives from the Saar. Since the Saar elects no representatives to the French Chamber such nomination would be impossible, and the French Government would have to arrange for a certain number to be elected by the Saar legislature itself. Further, by Article 79 the Treaty is to apply to the European territories of the High Contracting Parties and to those European territories for whose foreign affairs the signatories are responsible. The article then draws attention to an exchange of letters between France and the Federal Republic of Germany concerning the status of the Saar. These letters constitute an annex to the Treaty and in them the Federal Republic makes clear that its participation in the Treaty in no way affects its refusal to recognise the existing status of the Saar. This express reservation was necessary in view of the fact that the Treaty provides for ‘reciprocal affirmative duties and obligations’ and requires ‘affirmative intergovernmental co-operation and dealings’, and the signing of such a ‘treaty without reservation would carry with it an implication that the signatories are prepared to treat with each other on an equal footing’,[14] recognising each other's claims to jurisdiction.

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[12] La Documentation Française, Notes et Études Documentaires, Textes Diplomatiques CV, June 9, 1951, No. 1489 (the writer has used his own translation throughout).

[13] See, for example, John, ' France, Germany and the Saar ', 4 *World Affairs* (New Series), 1950, p. 277 *et seq.*

Article 79 also provides that any preferential treatment in respect of coal and steel enjoyed by any of the Parties to the Treaty in its non-European territories is to be extended to all the Contracting Parties. This article is in keeping with the general economic purpose of the Treaty to create a common market with all its members participating on equal terms and enjoying equal preferences. Unlike the open door principle embodied in the Mandates of the League of Nations,[15] or the principle of economic good-neighbourliness in Article 74 of the Charter of the United Nations, there is no provision in the

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[14] Opinion of the Legal Adviser to the State Department, March 15, 1932; 1 Hackworth, *Digest of International Law,* 1940, p. 351. On implied recognition resulting from participation in treaties, see Chen, *The International Law of Recognition,* 1951, pp. 204–211.

[15] See, for example, Article 18 of the Palestine Mandate, 1 Hudson, *International Legislation,* 1931, p. 116.

Schuman Plan Treaty reserving the overriding interest of the territory concerned. Instead, provision is made in Article 70 for the imposition of special internal tariff measures relating to the transport of coal and steel and established in favour of a particular coal- or steel-producing enterprise. Such discriminatory measures, however, require the prior agreement of the High Authority which must examine them from the point of view of conformity with the Treaty. In view of the operation of Articles 70 and 79 it is perhaps doubtful whether the measures applied by Belgium on behalf of Unatra in the Belgian Congo and upheld by the World Court in the *Oscar Chinn Case,* 1934,[16] would be legal once the present Treaty is in force.

Such measures as those referred to would require examination in accordance with Articles 2–5 of the Treaty in which are embodied the aims and principles of the European Coal and Steel Community. The purpose of the Community is to ' contribute to economic expansion, the development of employment and the raising of the standard of living in the participating countries through the institution, in harmony with the general economy of the member states, of a common market. . . . It must progressively establish conditions which will in themselves assure the most rational distribution of production at the highest possible level of productivity, while safeguarding the continuity of employment and avoiding the creation of fundamental and persistent disturbances in the economies of the member states '. In addition, the Community is to assure to all consumers in a comparable position within the common market equal access to the sources of production, while seeking the establishment of the lowest possible prices and marketing conditions which would encourage the expansion and improvement of coal and steel enterprises. At the same time, import and export duties would be abolished, as would quantitative restrictions on the movement of coal. Discriminatory practices among producers, buyers or consumers, especially with reference to prices, delivery terms, transport rates, and measures controlling the buyer's free choice of supplier would also be abolished. Subsidies or other forms of state assistance would be incompatible with the Treaty—which would cover the situation discussed in the *Chinn Case*—as would restrictive practices tending to divide markets or exploit the consumer. Apparently, therefore, any cartel, independent or state-assisted, within the Community would be illegal.

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[16] Series A/B, No. 63.

THE COMMUNITY AS AN INTERNATIONAL INSTITUTION

In their original proposals the French Government envisaged an authority, membership of which would be open to all the states of Western Europe, and which would take over control and production of all coal and steel in that area.

By the Treaty signed in 1951 a European Coal and Steel Community was established. This Community, whose organs by Article 7 are a High Authority assisted by a Consultative Committee, an Assembly, a Council of Ministers and a Court, was endowed, in Article 6, with legal personality. Article 104 of the Charter of the United Nations provides that 'the Organisation shall enjoy in the territory of all its members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes'. The same basic concept underlies Article 6 of the Schuman Treaty, but this article is somewhat more specific and detailed: 'In the international sphere, the Community shall enjoy such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes. In the territory of each of its members the Community shall enjoy the maximum legal capacity enjoyed by national legal persons; in particular, it shall be able to hold and convey moveable and immoveable property, and sue and be sued'.[17] Just as Article 105 (1) of the Charter provides that the United Nations 'shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfilment of its purposes', so Article 76 of this Treaty makes the same provision for the European Coal and Steel Community. The Charter, however, made no attempt to spell out the nature of the immunities and privileges. Not until eight months after the Charter had been signed were these privileges defined in a legal document. The Convention on the Privileges and Immunities of the United Nations[18] is a separate document from the Charter. On the other hand, the Protocol on the Privileges and Immunities of the European Community is annexed to the

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[17] These arrangements should be contrasted with those for the Bank of International Settlements: see Schwarzenberger, *Die Internationalen Banken für Zahlungsausgleich und Agrarkredite*, 1932, p. 51 *et seq.*

[18] Cmd. 6753 (1946).

Treaty, and is as much a constituent part thereof as the Statute of the Court established by the Treaty.

The buildings and archives of the Community are inviolable, and it is immune from all direct taxation, although it is not expected to claim immunity from taxes imposed in respect of public utilities. As regards its correspondence, the Community is entitled to the same treatment as is accorded to diplomatic missions. As with the United Nations, the officials of the Community and the representatives to the various organs are immune from suit in respect of all actions taken by them in their representative capacity.

The extent of the privileges varies with the organ to which the individual belongs. The members of the High Authority and the senior officials of the Community are entitled to a *laissez-passer,* which member States have undertaken to respect. Members of the Assembly receive from their home and other governments the same treatment as is normally accorded to high officials abroad on government business. While the Assembly is in session, they receive from their home Government the same immunity as is enjoyed by members of the national parliament, but from other members they receive complete immunity. The members of the Council of Ministers receive the ' customary privileges and immunities ', while the High Authority and the Community officials enjoy immunity, which continues after their functions cease, for all official acts and speeches. They are also, with their families, exempt from immigration regulations and formalities. The President of the High Authority is to publish a list of all Community officials and, since the immunities are granted only in the interest of the Community, they may be waived by him if he deems the alleged act to be contrary to the interests of the Community. Here the Protocol reproduces the principles embodied in Article 23 of the United Nations Convention. The latter provides that any dispute arising out of it shall be referred to the International Court of Justice; the Protocol, however, refers the dispute to the Court established by the Treaty.

It is clear from the above that the European Coal and Steel Community possesses full legal personality, but, although the constituent instrument is a treaty which can only be interpreted in accordance with international law, there is no suggestion that this personality is to be defined in accordance with international law. In fact, a German commentator has stated that since the international order knows no supra-national authority, the Community rests not on an international but on a municipal legal basis. He asserts that, although sovereign powers with regard to coal and steel have been transferred to the Community, the status of which depends on its own constituent instrument, 'the law of the Community is not particular international law, nor is it international law in the sense of municipal conflict rules; on the contrary, it prevails throughout the territory of the Community as substantive constitutional, administrative and economic law in place of the rules of municipal law hitherto applicable to coal and steel'.[19] It is submitted that the replacement of the former municipal law, and the fact that the immunities of the Community are diplomatic in character and that decisions of the High Authority are binding on pain of sanction, and if of a financial character will, by Article 92, be enforced by the national courts, suggest that the European Coal and Steel Community is an international institution in the true sense of the term, even though there is no suggestion that its Court shall apply rules of international law, but it is to apply the law of the Treaty which means in fact international law. Since, however, it may be argued that the Community is a joint municipal institution, the Court may in fact be applying joint municipal law.[19a]

There are various methods of classifying international institutions. Thus reference may be made to the *ad hoc* or permanent character of the institution, to the scope of its membership, or to its activities and functions.[20] The European Coal and Steel Community is intended to endure for fifty years and is envisaged as the forerunner of a real federation. It would appear to be as permanent as anything can be in the modern world, and is geographically confined, at least in its initial stages, to France, Germany, Italy and the Benelux countries. It is hoped, however, that this membership will ultimately expand to include the United Kingdom, Scandinavia and the whole of Western Europe. By Article 98, in fact, it is open to the whole of Europe. It may be said, therefore, that the Schuman Plan Treaty has established a permanent regional institution.

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[19] Schlochauer, 'Der übernationale Character der Europäischen Gemeinschaft für Kohle und Stahl', *Juristenzeitung*, No. 10, May 20, 1951, pp. 289–290.

[19a] For a similar view concerning the International Military Tribunal, Nuremberg, see Schwarzenberger, *International Law*, Vol. 1, 1949, pp. 311–312.

[20] Schwarzenberger, *International Law*, Vol. 1, 1949, p. 381. For the law of international institutions, generally, see *ibid.*, Chaps. 39–47.

Functionally, international institutions may be classified as judicial, administrative, quasi-legislative and comprehensive or general purpose, while it seems to be a general legal principle that international institutions have their basis in treaty, are sole judges as to the extent of their own competence, and act as independent entities distinct from the members of which they are composed.[21] As has been seen, the European Coal and Steel Community is to be established after the Schuman Plan Treaty comes into force. It will be an autonomous body whose activities are conducted through the medium of various organs whose competency is measured by the decisions of the Court, which is itself an organ of the Community. That the Community is independent of its members is seen from such articles as Article 9. This provides that members of the High Authority will function in complete independence in the general interest of the Community and free of interference by any government or any organisation. No similar article is to be found in that part of the Treaty which deals with the members of the Assembly, but their independence is guaranteed by Article 8 of the Protocol on Privileges which provides that ' members of the Assembly cannot be questioned, imprisoned or prosecuted in respect of any opinion expressed or vote cast in the exercise of their functions '. As regards the judges of the Court, not only are they not allowed to exercise any political or administrative function but, by Article 4 of the Protocol embodying the Court's Statute, they are not allowed to possess, directly or indirectly, any interest in coal or steel throughout the pendency of their office and for three years afterwards. As regards the Community itself, Article 1 of the Protocol on Privileges provides for the immunity of its property which may, however, be subjected to judicial or administrative constraints if these are authorised by the Court.

In view of the fact that the Court is one of the organs of the Community it would be difficult to deny that the latter is an institution possessing judicial functions. Although there are only six parties to the Treaty, by Article 32 the Court consists of seven judges appointed by the Parties from persons of recognised independence and competence. The number of judges may be increased by a unanimous decision of the Council of Ministers, but there is no provision in either the Treaty or the Court's Statute for the appointment of national judges. By Article 18 of the Statute the Court is constituted when five judges are present, and by Article 19, although judges should have had no prior connection with the case and must inform the President if they feel they should not sit, the nationality of any judge, or the absence of a judge of the nationality of one of the parties to the case, is no ground for altering the composition of the Court. Many may feel that this refusal to compromise the absolute independence of the Court is preferable to Article 31 of the Statute of the World Court, but a recent Belgian critic looks upon it with disfavour and has suggested that it may well result in states declining to use the Court.[22]

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[21] Schwarzenberger, *International Law,* Vol. 1, 1949.

Another instance of the superiority of the Court of the European Community over the World Court is the arrangement for executing judgments. As is well known, by Article 94 of the Charter the members of the United Nations have undertaken to carry out decisions of the International Court of Justice in cases to which they are parties. In the event of one party failing to do so, the other may have recourse to the Security Council, ' which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment '. The value of this provision may be assessed in the light of the fate suffered by the United Kingdom's reference to the Council of the Iranian refusal to carry out the terms of the Court's decision on the Request for the Indication of Interim Measures of Protection in the *Anglo-Iranian Oil Co. Case*, 1951.[23]

By Article 31 of the Schuman Plan Treaty the Court is ' to ensure respect for law in the interpretation and application of the present Treaty and of its implementing regulations '. The Court has jurisdiction to hear appeals from member states or the Council of Ministers seeking annulment of decisions or recommendations of the High Authority on the grounds of incompetence, excess of authority or violation of the Treaty or of any rule of law concerning its application. In addition, enterprises or associations affected by a decision or recommendation directed to them have a similar right of appeal. As the High Authority's decision or recommendation may depend on economic facts, Article 33 prevents the Court from examining any conclusion of the High Authority based on economic facts, nor may it examine the economic facts and circumstances forming the basis of a decision or recommendation unless it is alleged to be *ultra vires,* or there is a clear misinterpretation of the Treaty or a rule of law. Appeal also lies to the ' general jurisdiction ' of the Court against any pecuniary punishment imposed by the High Authority. Since the Court apparently enjoys complete discretion it seems here to possess an equitable jurisdiction. Damages may be awarded against the Community, but by Article 40 they are also recoverable against an official or employee of the Community, and if recovery against either of these is impossible the Court may assess an equitable indemnity against the Community itself. All claims against the Community, other than those relating to the interpretation of the Treaty or its implementing rules, lie to the municipal courts, but if the acts of the High Authority or the Council of Ministers are impugned before these courts the European Court is to be informed and should possess exclusive jurisdiction. Although according to Article 39 litispendence does not have an automatic suspensive effect, the Court can order the suspension of the challenged decision or recommendation and can prescribe other provisional measures if necessary.

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[22] Rolin, ' La Cour du charbon et de l'acier ', *Journal des Tribunaux*, No. 3899, June 10, 1951, p. 345.

[23] Order of July 5, 1951: *I.C.J. Reports 1951*, p. 89.

The operative article with regard to the execution of judgments is Article 44, which provides that all judgments are executory in the sense of Article 92. The latter provides that judgments are to be enforced within the territory of member states in accordance with local legal process, the writ of execution issuing from a specially designated minister on proof of the judgment—certainly a method preferable to that of the Charter whereby a political body decides whether political realities are such as to enable the five permanent members to agree to give effect to the judgment of what is supposed to be a legal tribunal.

Unlike the International Court of Justice, the European Coal and Steel Court is, in the words of the Belgian critic already mentioned, ' typical of classical international tribunals '—in fact, the rules relating to revision and interpretation of judgments are reminiscent of those of the World Court—' of mixed tribunals and of municipal administrative tribunals '—in case of need the Court will sit with qualified special masters, while it has the services of two Court advocates who are officials of the Court appointed ' to present publicly and with complete impartiality and independence oral reasoned arguments on cases submitted to the Court ', a function similar to that fulfilled by the *commissaire* in proceedings before the *Conseil d'État*[24]—' and also of federal tribunals before which constituent members seek protection against abuse of power by the political organs of the Union '[25]—even decisions of the executive, the High Authority, are subject to its supervision.

As already indicated, international institutions may also fulfil administrative functions. In the municipal field the term administration is easily defined, but this is not always the case in the international sphere. The High Authority of the European Community has, however, been entrusted with the task of administering the common market when established and of regulating the transition period that must elapse between the coming into effect of the Treaty and the creation of the common market. Furthermore, many of its activities are essentially technical or economic in character intended to give effect to the aims and purposes of the Community as enunciated in Articles 2–5 of the Treaty. It is also, by virtue of Article 46, within the competence of the High Authority to consult governments, associations, such interested parties as enterprises, workers, consumers and dealers, as well as experts, and to receive any suggestions submitted by them. It is also empowered to carry out surveys with regard to such matters as the redeployment of workers displaced by the evolution of the common market or by technical developments, while it may gather information and have verifications carried out. The Assembly, too, has an administrative function to fulfil, for by Article 20 it is ' composed of representatives of peoples of the members' states and is to exercise the supervisory powers '—generally speaking over the actions of the High Authority—' prescribed by the Treaty '.

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[24] Hamson, ' Rule of Law in France ', Part 2, *The Times,* February 21, 1951.

[25] Rolin, *loc. cit.,* p. 345.

Perhaps the organ which performs the chief administrative function is the Council of Ministers. Article 26 of the Treaty defines the prime role of the Council as ' the harmonisation of the actions of the High Authority with those of the Governments, who are responsible for the general political economy of their countries '. The Council is to achieve this purpose by exchanging information and holding consultations with the High Authority, which it may request to carry out a study of any proposals considered necessary by the former for the realisation of the common objectives.

In modern political life the borderline between legislative and executive functions is by no means clearly marked. In international life, with the possible exception of international conferences, particularly those entrusted with drawing up peace treaties, executive and legislative functions are virtually unknown. It is only when one is confronted by an institution like the International Labour Organisation, the proposed Conventions of which must be submitted to national legislatures, that something in the nature of quasi-legislative functions exist. What is interesting about the International Labour Organisation, however, is not so much this quasi-legislative characteristic as the tripartite character of its representation giving expression to the interests of governments, employers and workers.

The European Community for Coal and Steel, on the other hand, possesses both executive and legislative functions, and gives representation to the varying interests concerned in the coal and steel industries. It is perhaps more convenient to consider the problem of representation first. There is nothing to be said about the Court, while the Council of Ministers, as its name implies, consists of representatives of the member states each of which is to delegate a member of its government. The membership of the Assembly has already been considered and is constituted in a similar way to the Consultative Assembly of the Council of Europe. Allocation of seats is on a relative basis, the three most populous states, France, Germany and Italy, having eighteen each, while Belgium and the Netherlands have ten each and Luxemburg only four. As has been noticed, member States do not have complete discretion in the appointment of Assembly members as they do with the Consultative Assembly.

In an annexed Protocol [26] an attempt is made to change the analogy with the Council of Europe into a link. By Article 1, 'Governments of member States are invited to recommend to their respective Parliaments that the members of the Assembly, whom they are called upon to appoint, should, preferably, be chosen from among the representatives to the Consultative Assembly of the Council of Europe', and in March, 1952, Mr. Eden suggested that the members of the Community's Council of Ministers should in fact be members of the Council's Committee of Ministers. It was made clear from the outset that the ultimate objective was for the European Coal and Steel Community to pave the way for a full European federation. It is not surprising, therefore, that, although Article 93 of the Treaty requires the High Authority to maintain the closest possible liaison with the United Nations and to keep that organisation fully informed of the Community's activities, fullest co-operation is envisaged with the Council of Europe of which, unlike the United Nations, both the Federal Republic of Germany and Italy are members. This close co-operation is provided for in the Protocol. The Assembly is required to send an annual report to the Consultative Assembly, while the High Authority must supply both the Committee of Ministers and the Consultative Assembly with the general report on the Community's activities and administrative expenses required annually by Article 17 of the Treaty. The High Authority must also inform the Council of Europe of the steps taken pursuant to recommendations addressed to it by the Committee of Ministers in accordance with the Council's Statute.[27] Although most of the parties are members of the United Nations no provision is made for similarly close co-operation with that institution. It is to be hoped, therefore, that the High Contracting Parties will not allow themselves to be deluded by the glamour of the Council of Europe and the goal of ultimate federation.

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[26] Protocol on Relations with the Council of Europe.

It is in connection with the High Authority that representation is afforded to partisan interests. The Authority itself consists of nine members chosen for their general competence. They must be nationals of member states and no more than two may possess the same nationality. The mode of election embodied in Article 10 is a little strange. Eight are appointed by the member States acting in concord, while the ninth is nominated by the eight existing members and requires five votes to be elected. Article 18 provides for a Consultative Committee to assist the High Authority. It is to consist of from 30 to 51 members made up of equal numbers of producers, workers, and consumers and dealers. All, however, are to be nominated by the Council of Ministers. In so far as producers and workers are concerned the Council is to nominate the representative organisations among which it will allocate the seats to be filled. Each organisation then submits a list containing twice as many names as the seats to which it is entitled, and the Council appoints from these lists. The elected individuals serve in their personal capacity and receive no mandate or instructions from the organisations which first nominated them. A glance at the advisory opinion of the World Court on the *Nomination of the Netherlands Workers' Delegate*, 1922,[28] will show how much more independent are the employers' and workers' organisations under the Constitution of the International Labour Organisation.

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[27] Cmd. 7686 (1949): Article 15 (b), 'In appropriate cases, the conclusions of the Committee may take the form of recommendations to the Governments of Members, and the Committee may request the Governments of Members to inform it of the action taken by them with regard to such recommendations'.

All executive and legislative functions possessed by the Community are within the competence of the High Authority. Article 14 authorises this body to issue binding decisions which are obligatory in every respect, and recommendations which are binding as to their objectives but which leave freedom of choice as to their means of fulfilment. The word ' recommendation ' seems to be used in a sense different from that of the Charter of the United Nations and of normal diplomatic language, where it normally lacks any binding character.[28a] Article 15 permits the High Authority to issue individual decisions or recommendations addressed to a particular member, enterprise or association. Such individual decisions and recommendations become binding on communication to the addressee, while all others become binding on publication.

The High Authority has wide powers of punishment over enterprises evading their obligations. These punishments vary. By Article 47 a fine of one per cent of the annual turnover, or a daily penalty of five per cent of the average daily turnover for each day the violation continues, may be imposed. The same article provides, however, that if the High Authority divulges a trade secret it may be sued before the Court. Article 50 permits the High Authority to impose levies for such matters as administrative expenses, non-reimbursable assistance to cover the rehabilitation of displaced labour or the technical education of workers forced to change their employment by developments in the common market. Such levies are not to exceed one per cent of the annual value of the coal or steel produced—as defined in a special annex—unless prior authorisation is obtained by a 2/3 vote of the Council of Ministers. Should any enterprise fail to meet this levy it may be increased to five per cent for each three months' delay. The High Authority may fix maximum and minimum prices and, by Article 64, fines may be imposed for violations. For a first offence the fine is twice the amount of the irregular sale; a second offence doubles the fine. Similarly, agreements to fix prices, restrict production, or allocate markets are forbidden. Article 65 provides that they may not be invoked before any court or tribunal in any of the member States, while fines may also be imposed. If the object is to restrict production, a fine of 10 per cent of the annual turnover or daily penalties of two per cent may be imposed. On the other hand, if an enterprise exceeds its allotted quota it may also be penalised. However, it should not be forgotten that decisions of the apparent executive, the High Authority, may be overruled on appeal to the Court, suggesting that true executive power in fact lies with the Court.

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[28] Series B, No. 1.

[28a] *Corfu Channel Case* (Preliminary Objection), 1948, *I.C.J. Reports 1948*, p. 15, Separate Opinion at p. 32.

The High Authority is also competent to interfere in other fields of domestic jurisdiction. By Article 67, if state action is likely to have an adverse effect on national steel or coal enterprises, the High Authority may permit assistance to the affected enterprises or make recommendations to the state concerned. Likewise, although the Treaty is not to affect wage-fixing methods, the High Authority may, according to Article 68, if low prices are the result of an abnormally low wage, make recommendations, and if the enterprise in question does not observe the recommendation it may be fined or penalised to twice the amount unjustifiably saved. Finally, the member States have undertaken not to place any nationality restrictions on the employment of qualified men. All nationals of member States are to receive national treatment, but the relevant article, 69, leaves existing international obligations unaffected. The members have undertaken to amend their immigration regulations to satisfy these obligations if necessary, but they are still entitled to impose restrictions based on ' fundamental needs of health and public order ', a limiting concept that is so vague as to cover almost any restriction that a member might care to impose.

Organisations which fulfil judicial, administrative and quasi-legislative functions are usually described as comprehensive or general purpose international institutions. This characterisation, however, is normally reserved for entities like the League of Nations and United Nations; that is to say, bodies of large membership and having authority to act in a variety of fields. The European Community consists of only six members and has authority only over the coal and steel industries. It is therefore probably wisest to describe it not as a comprehensive institution, but as a regional institution having all-embracing powers in a limited field. On the other hand, it could be contended that the Community is not so much an international institution, but, resembling the International Military Tribunal at Nuremberg, is a common municipal institution created by an international instrument.[29]

Since the signing of the United Nations Charter it has become popular to introduce some type of majority principle into the voting procedures of international institutions. The Statute of the Council of Europe showed the almost infinite variations that could be played upon the same theme. The Schuman Plan Treaty is even more complicated. For some purposes a 2/3 majority of the total membership is required, for others only 2/3 of those present and voting. By Article 10 a new High Authority is elected as to eight members by 5/6 of the member states, while the ninth is elected by 5/8 of the eight already elected. Further, where the 5/6 majority is concerned, a member state is entitled to exercise a veto, but if this veto has been used twice in electing one new member or in electing four members at a biennial or general election, any further veto may be referred to the Court for a ruling that the exercise is void as abusive. Perhaps the most peculiar voting methods apply in the Council. A non-reimbursable grant requires a 2/3 majority, while loans to industrial enterprises require unanimity. Usually the type of majority is not specified, and in such cases Article 28 provides that the Council's agreement is to be presumed if, there being an absolute majority, it includes the vote of one of the states producing at least 20 per cent of the Community's total coal and steel production; or if, the vote being equal, the proposal receives the support of at least two states each producing at least 20 per cent of the total production. This means that the Council can only give its consent if France or Germany agrees, and if equally divided only when both agree.[30]

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[29] On this aspect of Nuremberg, see Schwarzenberger, *International Law*, Vol. 1, 1949, pp. 311–312.

RELATIONS WITH NON-MEMBERS

Every international institution is faced with the problem of the non-member. The League of Nations found its limitations expressed in the *Eastern Carelia Case*, 1923,[31] while the Charter seeks to avoid difficulties through the medium of Article 2 (6), and the World Court has contributed its quota to the difficulty by its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, 1949.[32] Any organisation of an economic character is bound to be confronted with numerous problems of this kind, and the Schuman Plan Treaty attempts to deal with them in the provisions applying to the transition period that will last five years from the coming into force of the Treaty.

In the first place, by Article 14 of the Convention on Transitional Arrangements the High Authority is to negotiate with third parties, especially Great Britain, on overall economic and commercial relations regarding coal and steel. In these negotiations it will act on behalf of members. Great Britain has herself recognised the significance of the plan where she is concerned and, even before France or Germany ratified the Treaty, appointed a special representative to the High Authority. Special provision is made for the temporary continuance of peculiar tariff quotas that may exist, for example that between Belgium and Great Britain, although it is intended that these should be liquidated during the transition period. As regards existing tariff and trade agreements, the High Authority is to inform members whether they are compatible with the Treaty, and to recommend methods of terminating them.

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[30] In 1951 it was estimated that the six participating countries produce 216 million tons of coal and 31 million tons of steel per year, with Germany producing 51 and 38.3 and France 23.4 and 27.4% respectively, 5 *News from Germany*, April/May 1951, Nos. 4/5, p. 1. In 1952, M. Grandval, the French Ambassador in the Saar, stated that 'with the Saar French steel production amounted to 34% of the total . . ., and Germany's 35%. If the Saar became economically a part of Germany, German steel production would be 42% of the total, while France's would drop to 25%. *This would create an intolerable position*' (italics added), *The Times*, March 20, 1952.

[31] Series B, No. 5.

[32] *I.C.J. Reports 1949*, p. 147.

The problem of termination will be most important in connection with most-favoured-nation arrangements. By Article 21 the members recognise the Community as a special customs system, while, as has been seen, the effect of the Treaty is to create a preferential system applicable to the six member states. By Article 20 the members agree to take joint action towards the members of the GATT to secure the exemption of the Schuman Plan from the most-favoured-nation standard embodied in Article 1 of the General Agreement on Tariffs and Trade, 1947,[33] and if necessary they will request a special meeting of GATT for the purpose. As regards a third country enjoying most-favoured-nation treatment but not a member of the GATT, the Contracting Party undertakes to enter negotiations for amendment, and, by Article 20, in the event of a country refusing its consent, modification or denunciation is to be effected in accordance with the terms of the agreement. In such a case the other member States undertake to lend effective assistance which may go so far as general denunciation by all the member states of agreements entered into with the country in question. If such action were taken it would be interesting to see the attitude of the World Court to a treaty creating an obligation contrary to a prior obligation due to a non-member and which the latter persists in maintaining, for it would be of no avail to plead that an obligation due to B necessitated the denunciation of a prior obligation due to C. Despite this general clause, provision is made to cover the special position of the Federal Republic of Germany. By Article 22 trade between the Republic and the Russian Zone is to be regulated by the Federal Government in

[33] Cmd. 7258 (1947).

agreement with the High Authority. Finally, the Parties have secured a pledge from the Allied High Commission—France, Great Britain and the United States—that the International Authority for the Ruhr, which limits German coal and steel production in a way that is incompatible with the Treaty, shall end with the establishment of the common market, and shall cease to exercise any functions incompatible with the Treaty as soon as the High Authority is set up.[34]

It is clear from what has been said that the Schuman Plan raises interesting problems in connection with international treaty law, particularly where third parties are concerned, with international economic law and with the law of international institutions. This will be particularly so when the other proposed European organs have been created. Here a *caveat* must be entered, for there is a danger of subdivision rather than co-ordination resulting from a multiplication of agencies. International institutions and their organs require financing and, especially in time of economic crisis, there is the possibility of states maintaining that they can afford nothing more. On the judicial level alone we have the World Court, and there is talk of an International Court of Human Rights, an International Criminal Court, a European Court of Human Rights, and now we have the Court of the European Steel Community. There is to be a Pleven Plan Court and probably another for European Agriculture. What is true in the judicial field is equally true in other fields. Until there is some central institution with power to co-ordinate this multitude of bodies, effort may be so divided as to achieve nothing.

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[34] *The Times,* October 20, 1951.

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THE PROTECTION OF BRITISH PROPERTY ABROAD

GEORG SCHWARZENBERGER

> 'Property and law are born together. Before the laws there was no property: take away the laws, all property ceases'.
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> (Jeremy Bentham, *Principles of the Civil Code,* 1786.)

IN every mature legal system, the law of property counts among the most technical branches of the law. It is lawyer's law *par excellence.* It needs, however, the change of only one word, and another and more formidable subject emerges: law *and* property. Now, we no longer think of the writers of standard textbooks on personal or real property, but of personalities of somewhat different dimensions, the great revolutionaries in the field of property relations: William the Conqueror, Henry VIII, Lenin, Stalin and, perhaps, even Hitler. Behind the technicalities of every existing system of property law lie, shrewdly hidden, the fundamental political, social and economic decisions on which these legal rules are based. Once these are laid bare, it becomes evident that we have uncovered one of the deepest roots of the law, and we readily understand why a subject that, on the surface, is merely technical is inextricably bound up with the most crucial decisions that every community has to make.

All the more is this true if we are not content to treat this topic in the shelter of a stable community, but in the turbulent environment of international society. Here, communities with vastly differing outlooks on these fundamental problems confront each other, and not always on a footing of equality. It is difficult not to take sides when we recall Palmerston's vigorous—or impetuous—action in the *Don Pacifico Case,*[1] the heart-searching inter-British debate between Sir John Fischer Williams and Dr. Fachiri in the inter-war period on the scope and continued validity of the classic doctrine of international law in this field[2] or become conscious of the considerable national interests involved.[3] To clinch matters, conflicts of interest are inevitably bound up with wider ideological issues: the claims of new—and, therefore, necessarily immature—forms of nationalism; charges of imperialism and conflicting evaluations of free enterprise, socialism and communism.

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[1] 39 *British and Foreign State Papers* (1849–1850), p. 410 *et seq.* It is not so well known how often Palmerston exercised a restraining influence. Cf., for instance, the *Wallis Case* (28 *ibid.* (1839–1840), at p. 966) or Palmerston's Circular to British Representatives in Foreign States, respecting Debts due by Foreign States to British Subjects, January, 1848 (42 *ibid.* (1852–1853), pp. 385–386).

The existing tension may be summed up in two quotations. The one, echoed most consistently in the inter-war period and after by the United States Department of State, was expressed uncompromisingly in the British General Observations in the case of the *Expropriated Religious Properties* (1920) between France, Spain and the United Kingdom, on the one hand, and Portugal, on the other[4]: 'Respect of property, respect of acquired rights, these are the legal principles of all civilised countries. On the security which they assure and the confidence they inspire the relations maintained by nations with each other are based'. The mentality of some of the counter-players is perhaps best illustrated by one of Dr. Moussadek's pathetic utterances at Flushing Meadows[5]: *'Tant pis-tant pis pour nous et tant pis pour vous'*.

The first task is to define the scope of this explosive subject. In international law, the term *property* has come to be coextensive with any type of rights and interests in property and is synonymous with foreign investments.[6] It includes both State-owned and private property. State property, however, follows rules of its own of a less controversial character than those which govern private property, and the rules to which property in time of war is subject differ fundamentally from those applicable in time of peace. Therefore, both the protection of British State property abroad and of British property in time of war will have to be excluded.

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[2] (1925) 6 *B.Y.I.L.*, p. 159 *et seq.*; (1928) 9 *ibid.*, p. 1 *et seq.*, and (1929) 10 *ibid.*, p. 32 *et seq.*

[3] In the early fifties of the nineteenth century, British investments outside the British Empire amounted to between £300 and 400 million. By 1914 they had grown to over £3,000 million. During and after the First World War they declined temporarily but, towards the end of the inter-war period, British investments overseas, including the Dominions and foreign countries, again represented a capital value of over £3,500 million. During the Second World War and since, they declined to about £2,000 million in 1949. See further, E. Staley, *War and the Private Investor,* 1935, p. 523 *et seq.*; Royal Institute of International Affairs, *The Problem of International Investment,* 1937; L. H. Jenks, *The Migration of British Capital to 1875,* 1938, and R. M. Kindersley, *British Overseas Investments,* 49 *Economic Journal,* 1939, p. 692, and Bank of England, *United Kingdom Overseas Investments 1938 to 1948,* 1950.

[4] Deposited with the Permanent Court of Arbitration on February 21, 1914, p. 9.

[5] *The Times,* October 18, 1951.

[6] See, for instance, Article 6 (a) of the Memorandum attached to the Agreement of January 6, 1946, between the United Kingdom and India, on the one hand, and Siam, on the other (Cmd. 8140–1951) or Article 78

British property, which the Government of the United Kingdom is entitled, at its discretion, to protect, falls into a number of categories. Apart from more far-reaching rights conferred by treaties, the right of protection extends to the property of citizens of the United Kingdom and Colonies and citizens of Southern Rhodesia; British subjects other than citizens of a member State of the British Commonwealth; British protected persons; companies incorporated under the laws of the United Kingdom or in any territory for the international relations of which the Government of the United Kingdom is responsible, and, in extreme cases of an alleged international tort, also to companies incorporated under the law of the alleged tortfeasor, provided that shareholders in any of the categories of nationals enumerated above hold a controlling interest in such companies.[7]

In this topic, the historical aspect is so much of the essence of the matter that no apology need be offered for dealing with it as an integral part of a current legal problem.

(9a) of the Peace Treaty with Italy (Cmd. 7481–1948) and, generally, J. H. Herz, *Expropriation of Foreign Property* (1941) 35 *A.J.I.L.*, p. 243 *et seq.*, or S. Friedman, *L'Expropriation en Droit International Public, L'Egypte Contemporaine,* 1950, p. 348 *et seq.*

[7] On the position of British-owned foreign companies—in the concrete case, the majority of shareholders were British subjects—cf. the Note of April 20, 1938, of the Government of the United Kingdom to the Mexican Government (Cmd. 5758–1938, p. 7 *et seq.*) in contrast to the Note of the same Government of July 5, 1928, to that of the United States in the *Romano-American Company Case* (5 Hackworth, *Digest of International Law,* 1943, p. 842 *et seq.*).

For instances of recent British treaty practice, cf. Article 6 (9) of the Memorandum mentioned in note 6 above; Article 18 (4b) of the Peace Treaty with Italy, or the Exchange of Notes of February 13, 1947, between the Governments of Argentina and the United Kingdom (Cmd. 7405–1948) and, generally, Sir Eric Beckett, *Diplomatic Claims in Respect of Injuries to Companies* (1931) 17 *Transactions of the Grotius Society,* p. 175 *et seq.*; J. Mervyn Jones, *Claims on behalf of Nationals who are Shareholders in Foreign Companies* (1949) 26 *B.Y.I.L.*, p. 225 *et seq.*; C. Parry, *British Nationality,* 1951, p. 62 *et seq.*, and R. L. Bindschedler, *Verstaatlichungsmassnahmen und Entschädigungspflicht nach Völkerrecht,* 1950, p. 45 *et seq.*

I. THE PROTECTION OF PRIVATE PROPERTY ABROAD IN HISTORICAL PERSPECTIVE

In the evolution of international law since the early Middle Ages, the protection of private property abroad has passed through three clearly discernible stages.

Initially, foreigners had to rely on such precarious protection as was granted to them and to their property under safe-conducts or under the municipal law of the State of sojourn or residence.[8]

Gradually and pragmatically, international law was elaborated in this field by means of a multitude of treaties of commerce. These treaties apart, international law lacked any settled principles for the protection of private property abroad.[9]

In the course of the nineteenth century, some of these optional treaty standards hardened into general principles of law recognised by civilised nations and even came to be considered as rules of international customary law. The law as it had crystallised during this formative and classical period can be stated in three propositions:

First, in principle, foreigners are subject to the territorial jurisdiction of the State of sojourn or domicil.

Secondly, the jurisdiction of every State regarding the property of foreigners is limited by the duty to comply with the minimum standards of international law. In particular, the organisation of every State must correspond to reasonably defined minimum requirements of the rule of law in the Anglo-Saxon sense or of the Continental *Rechtsstaat.* States must, for instance, provide for an independent judiciary. Interference with the property of foreigners is permissible only in the exceptional case of expropriation, that is to say, in circumstances in which the property is required for public purposes. In this case, the procedure of expropriation must be judicial or quasi-judicial, and the owner is entitled to prompt, adequate and effective compensation. Otherwise, expropriation amounts to illegal confiscation and is an international tort.

Thirdly, in the case of an illegal interference with property rights, the foreigner has first to exhaust all available local remedies. Then, or if there has been a delay or denial of justice, it is for the home State to decide whether it desires to make the case of its national its own and to take up the claim with the tortfeasor State on the international level.

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[8] See further *The Frontiers of International Law,* (1952) 6 *Year Book of World Affairs,* p. 246 *et seq.*

[9] See further *International Law in Early English Practice,* (1948) 25 *B.Y.I.L.,* p. 85 *et seq.*

In the course of the nineteenth and early twentieth centuries, these principles came to be generally accepted. Only in the case of new States, those with a bad record or on the fringes of the Western world, was it still thought necessary to embody these standards expressly in treaties of commerce. As the leading commercial nation, Great Britain took the lead in this work of consolidating the minimum standards of international law. By means of the automatism which exists in any system of interlocked most-favoured-nation treaties, the benefits thus obtained for British merchants were liberally generalised, and this network of, on the whole, declaratory treaties gave still greater precision to the minimum standards of international law.[10]

These principles rested on three assumptions which, until 1914, were substantially correct.

First, the State whose jurisdiction foreigners were meant to accept was the liberal State of the nineteenth century, the guardian of a capitalist economy and of free enterprise. It could be trusted to exercise sparingly its indirect powers of interfering with private property such as, for instance, in the field of taxation or, at least, to limit the excesses of its executive organs for the benefit of its own nationals.

Secondly, by common consent, the public purposes for which property might be lawfully expropriated were construed in the most restrictive sense. If expropriation was unavoidable, liberal compensation was granted and this was freely convertible into foreign exchange and transferable abroad.

Thirdly, the British Navy maintained the *Pax Britannica* and ensured that the representations made by British envoys abroad would receive proper attention. Even beyond its reach, the key position of the City of London in international commerce ensured that foreign governments would not lightly tamper with the sacrosanctity of British investments abroad.

During the inter-war period between 1919 and 1939 every one of these assumptions became somewhat problematic.

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[10] See further *The Protection of Human Rights in British Practice,* this Annual, Vol. 1 (1948), p. 152 *et seq.*, and *The Most-Favoured-Nation Standard in British State Practice,* (1945) 22 *B.Y.I.L.*, p. 96 *et seq.*

First, State activities everywhere expanded to a marked extent, and the emphasis shifted sharply from the rights of the owners of private property to their social duties towards the community. Experiments ranged from mild, but new forms of public and mixed enterprise *via* moderate programmes for the nationalisation of key industries and land reform to the extreme measures taken by the Communist regime then emerging in Russia. Even governments which were most emphatic in their protests against illegal interference with the property rights of their nationals abroad, exercised their sovereign right of taxation with growing enthusiasm in order to finance the expansion of their own State machineries.

Secondly, the public purposes for which expropriation came to be regarded as being legitimate correspondingly widened, and the tests of compensation became increasingly unfavourable to private owners even in States which considered themselves to be standard-bearers of private enterprise. Moreover, policies of currency devaluation, including the abrogation of gold clauses, exchange control and concomitant restrictions on the free transfer of capital abroad became common form.

Thirdly, as a result of the First World War, the position of the United Kingdom and of the City of London underwent significant changes. This country had ceased to be the world's biggest banker and creditor, but had contracted huge political and private debts towards the United States. As, however, the United States and Wall Street stepped into the shoes of the United Kingdom and of the City of London, this more than balanced the change in the British position on the international scale.

It would be mistaken to assume that these structural changes meant the end of the minimum standards of international law for the protection of private property abroad. Most of the written constitutions of the inter-war period attest at least to the lip-service that States still paid to the principle of the sanctity of private property. Even the Soviet Union had to work her passage home into the nexus of international trade by accepting in a series of treaties stringent and orthodox formulations of the rights of new investors in that country.[11] Moreover, the

[11] Cf., for instance, Articles 10 and 11 of the Preliminary Agreement of 1921 between Italy and the R.S.F.S.R. (L. Shapiro (ed.), *Soviet Treaty Series,* Vol. 1, 1950, p. 159) or Article 2 (5) of the Commercial Agreement of 1924 between Sweden and the U.S.S.R. (*ibid.,* p. 235).

Permanent Court of International Justice did its best to stigmatise the measures of liquidation of enemy property under the Peace Treaties of 1919 as exceptions from the traditional rules of international customary law and to reaffirm the minimum standards of international law on the protection of private property abroad. In particular, the World Court made it clear beyond doubt that, once the international standard had been violated, it was irrelevant if the State concerned applied the same treatment to its own nationals.[12] Non-discrimination was not to be regarded as a justification for the breach of the minimum standards of international law.

Nevertheless, the growing recognition of the need for a vast increase in State activities and for extensive State control of economic life and of the overriding right of States to limit the freedom of nationals and foreigners alike by means of unilateral exchange regulations indicated a profound change in outlook. It found vivid expression in inconclusive debates on this subject in the League of Nations,[13] in the division of expert opinion on the legality of the Rumanian land reform [14] and in the deadlock between the United Kingdom and the United States, on the one hand, and Mexico, on the other, over the nationalisation of the British- and United States-owned Mexican Oil companies. The position then taken by both Anglo-Saxon powers may be summed up in the words of one of the notes of the United Kingdom Government [15] to that of Mexico: 'His Majesty's Government in the United Kingdom do not question the general right of a Government to expropriate in the public interest and on payment of adequate compensation; but this principle does not serve to justify expropriations essentially arbitrary in character'. A defeatist tendency became noticeable to accept as inevitable a relaxation of absolute into relative standards and to exchange the traditional standards in favour of those of national or equitable treatment.

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[12] See further the present writer's *International Law,* Vol. 1, 1949, pp. 83 *et seq.* and 98 *et seq.*

[13] See, for instance, the Report of the Economic Committee to the League Council (C 309 (1) M. 114. 1925. II) or the Acts of the League of Nations Conference for the Codification of International Law, Vol. IV (1930. V. 17), p. 36 *et seq.*

[14] See F. Deák, *The Hungarian-Rumanian Land Dispute,* 1928, and *La réforme agraire roumaine en Transylvanie devant la Justice internationale et le Conseil de la S. de N.,* 1928. See also A. H. Roth, *The Minimum Standard of International Law applied to Aliens,* 1949, p. 81 *et seq.*

[15] Note of April 8, 1938 (Cmd. 5758–1938, p. 2). On the attitude of the United States, cf. J. L. Kunz, *The Mexican Expropriations,* 1940, and Hackworth, *Digest of International Law,* Vol. 3, 1942, p. 652 *et seq.* Swiss practice, too, stoutly upheld the traditional principles of international law. A useful survey of the relevant material will be found in Bindschedler, *l.c.* in note 7 above and in K. Seeliger, *Das ausländische Privateigentum in der Schweiz,* 1949.

In the post-1945 world, all the disintegrating factors at work in the inter-war period have become intensified. Soviet totalitarianism and State capitalism have spread east and westwards and led to a growing disrespect by the Soviet Union and her satellites for most of the canons of traditional international law.[16] An emotional and anti-foreign nationalism is sweeping the underdeveloped countries in the Near and Middle East and in Latin America. Finally, the obstacles obstructing the restitution of Jewish property in Germany and Austria, and still more so elsewhere in Central and Eastern Europe, are another vivid reminder of the decline in national and international standards in this field.[17]

In this unpromising environment, how is it still possible to safeguard British property abroad? It will be necessary to concentrate on three aspects of the subject: recent British Treaty practice, the Anglo-Iranian Oil Dispute, and the means of obtaining redress from foreign States.

2. RECENT BRITISH TREATY PRACTICE

Three types of treaty require analysis: the post-1945 treaties of peace; general treaties of a predominantly economic character and treaties of commerce and, finally, the compensation agreements concluded between this country and a number of States which have nationalised British-owned enterprises.

(1) *The Post-1945 Peace Settlements.* The pertinent economic clauses of these treaties are of especial significance; for in those cases in which restoration of the *status quo ante bellum*

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[16] See further *The Impact of the East-West Rift on International Law* (36 *Transactions of the Grotius Society for 1950,* p. 229 *et seq.*).

[17] On the complicated issues involved, cf. M. Hachenburg, *Probleme der Rückerstattung,* 1950, and H. Köhrer, *Entziehung, Beraubung, Rückerstattung,* 1951.

On the limits within which British and United States Courts have recognised acts of confiscation of Jewish property by the Nazi regime, cf. *Frankfurter* v. *Exner* [1947] Ch. 629; *Novello* v. *Hinrichsen* [1951] 1 All E.R. 779 and E. D. Re, *Foreign Confiscations,* 1951, p. 146 *et seq.*

regarding the property of British or United Nations nationals was not possible, it was necessary to fix the standard of compensation.

At a time when, at Nuremberg, Tokyo and Lake Success, aggressive war was branded as the crime of crimes, it might have been expected that to grant full compensation for the economic consequences of aggression was self-understood.

In the Agreement with Siam, India and the United Kingdom successfully maintained this position.[18] At the Paris Peace Conference of 1946, the United Kingdom Delegation made the same point, but had to give way to the combined pressure of the Soviet Union and of the United States.[19]

The actual settlement was on the basis of compensation at two-thirds of the value for lost or damaged property of United Nations nationals. If any of the defeated States should grant more favourable treatment to its own nationals, the standard of national treatment is to apply also in favour of United Nations nationals. While the compensation is freely usable in the debtor State concerned and exempt from any special charges, it is subject to the foreign exchange regulations of the debtor State.[20]

The lenient attitude taken towards Italy and the four satellites of the European Axis is explained in the Peace Treaties by the early withdrawal of some of these States from the German side and by their active contributions to the victory of the United Nations. In fact, other considerations were decisive. The United States then shouldered the major burden of financing Italian recovery. They therefore desired as little onerous a settlement for Italy as could be obtained. The Soviet Union felt equally protective over the ex-satellite States of the Axis with the exception of Finland, and one side could secure lenient treatment for its *protégés* only by granting the same concessions to the other's satellites. Thus, the United States stood out successfully for a compromise at the level of two-thirds against both the position taken by the Soviet Union in favour of compensation at the rate of one-third and against the British claim for full compensation.

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[18] Article 3 of the Agreement of January 1, 1946 (*l.c.* in note 6 above).

[19] Cf. United States Department of State, *Paris Peace Conference 1946*, pp. 115, 476, 531, 666, 852, 1029 and 1230–1231.

[20] See, for instance Article 78 (4–6) of the Peace Treaty with Italy (*l.c.* in note 6 above).

In the Peace Treaty with Japan, the principle of restoration has been safeguarded without any compromise. Japan must not grant less favourable terms than those contained in the draft Allied Powers Property Compensation Law approved by the Japanese Cabinet on July 13, 1951, and this provides for full compensation.[21]

(2) *General Economic Treaties and Treaties of Commerce.* On the level of multilateral treaties, the abortive negotiations for the International Trade Charter should be mentioned; for the more backward countries succeeded in defeating United States proposals for a more explicit protection of property invested in other member States.[22]

As Britain had successfully done over a prolonged period, the United States continued their vigorous policy of incorporating explicit clauses regarding the protection of private property in their post-1945 treaties of commerce.[23] Compared with earlier British practice and these consistent efforts of the United States, the post-1945 treaties of commerce of the United Kingdom are not exactly impressive on this point. In the Treaty with Nepal of 1950,[24] at least a reference is made to the minimum standards of international law. They are described as the 'generally recognised requirements of international law and practice' regarding the treatment of each other's nationals. The only other treaty in this category which calls for comment is the Exchange of Notes of September 21, 1946, between the Governments of Brazil and of the United Kingdom. It describes the position of foreign enterprise in Brazil in a studiously circuitous and non-committal manner [25]: 'The Brazilian Foreign Minister stated that the new Constitution offers full guarantees to foreign capital, the entry of which into Brazil is welcomed. The development of mineral and petroleum resources in Brazil is regulated by Government concessions which can be granted to individuals of Brazilian nationality or to juridical entities organised and established in Brazil in accordance with local law. The Constitution places no obstacles in the way of participation by foreign capital in such juridical entities. The Brazilian Foreign Minister added that, in his opinion, this principle will be maintained in future legislation regarding petroleum. He gave an assurance that President Dutra heartily desires the co-operation of foreign enterprise in Brazil and wishes to assure to it all necessary guarantees consistent with the new Constitution. His Majesty's Government welcomed this declaration'.

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[21] Article 15 (Cmd. 8392–1951).

[22] Cf. Article 12 of the Charter of ITO (Cmd. 7375–1948) and C. Wilcox, *A Charter for World Trade,* 1949, pp. 145 *et seq.* and 178–179.

[23] Cf. R. R. Wilson, *Property—Protection Provisions in United States Commercial Treaties,* (1951) 45 *A.J.I.L.,* p. 100 *et seq.,* and Article 10 of the Master Agreement on Economic Co-operation of 1948 between the United Kingdom and the United States (Cmd. 7469).

[24] Cmd. 8271–1950, Article 5.

[25] Cmd. 6952–1946, p. 4. See also the Exchange of Notes of October 17, 1947, between the Governments of Burma and of the United Kingdom, referred to in Article 8 of the Treaty of the same date recognising Burmese independence (Cmd. 7360–1948).

(3) *Nationalisation Agreements.* These treaties fall into three groups: those concluded by the Government of the United Kingdom with Latin American countries, with Communist States, and with France.

(a) *The Latin American Treaties.* The three treaties concluded in 1947 and 1948 with Argentina,[26] Mexico[27] and Uruguay[28] are confirmatory of agreements reached between the governments concerned and the shareholders of the companies taken over or to be taken over at the time when the agreements were concluded. In fact, each of these agreements merely put on a contractual basis unilateral action taken by Mexico in 1938, threatened by Argentina and more discreetly hinted at by Uruguay.[29]

Strictly speaking, only the Anglo-Mexican Agreement was concerned with an act of expropriation. It is, therefore, relevant to mention a reservation made by the United Kingdom regarding this action in the preceding Agreement of 1946[30]: 'Nothing contained in this note shall be regarded as a precedent, or be invoked by either of the two Governments in the settlement between them of any future difficulty, conflict, controversy or arbitration. The present provisions shall be considered as singular and exceptional, appropriate solely to this case, and motivated by the character of the problem itself'. In any case, Mexico agreed that the compensation should be 'just and equitable'.[31] According to private British estimates, the compensation amounted only to about one-third of the real value of the oil properties, whereas, in the case of the purchase agreements concluded between the British-owned railway companies and Argentina and Uruguay respectively, the compensation was thought to represent about 60 per cent of the capital value involved. In all three cases, the Latin American governments concerned granted at least effective compensation either in the form of instalments payable at New York in United States currency, as was undertaken by Mexico, or, as in the case of Argentina and Uruguay, the full amount was made available at the Bank of England in pounds sterling.

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[26] Cmd. 7405–1948.
[27] Cmd. 7275–1947.
[28] Cmd. 7629–1949.
[29] Cf. the Exchange of Notes contained in Cmd. 7340–1948, pp. 6–7.
[30] Cmd. 6768–1946, p. 4.

(b) *The East European Treaties.* The Agreement with Poland of 1948[32] is based on three principles: recognition by the United Kingdom of the Polish Nationalisation Law of 1946; acceptance by Poland of the duty to grant adequate and effective compensation to British investors, and the principle of individual compensation. On the last point, the Agreements with Czechoslovakia[33] and Yugoslavia,[34] both of 1949, differ from that with Poland. They provide for global compensation in settlement of all British claims arising out of the nationalisation measures taken by these two States.[35] Czechoslovakia undertook to pay the agreed compensation in pounds sterling in eighteen instalments at intervals of six months, commencing in 1950, and Yugoslavia committed herself to fifteen six-monthly instalments, commencing in the same year. To understand the meaning of the global figures contained in these treaties, only private estimates are available regarding the Polish settlement. The compensation stipulated is understood to be one-third of the value of the British investments nationalised by Poland. According to official British statements,[36] the settlements with Czechoslovakia and Yugoslavia represent 33⅓ per cent and 50 per cent respectively, of the value of British investments in these countries. Actually, the arrangement made in 1948 with Poland proved so unsatisfactory that, in 1949, it was agreed to contemplate its replacement by a global indemnity in pounds sterling.[37] Until now, the amount to be paid by Poland and the dates of the instalments remain unsettled.

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[31] Point 3 of the Exchange of Notes of February 7, 1946 (Cmd. 6768–1946) and Point 4 of the Correspondence of August 29, 1947 (Cmd. 7275–1947). Compensation was 35 per cent higher than the nominal value of the stock, which was greatly undervalued.

[32] Cmd. 7403–1948. Cf. also N. R. Doman, *Post-war Nationalisation of Foreign Property in Europe,* (1948) 48 *Columbia Law Review,* p. 1125 *et seq.,* and *Compensation for Nationalised Property in Post-War Europe,* (1950) 3 *International Law Quarterly,* p. 323 *et seq.;* S. J. Rubin, *Nationalisation and Compensation,* (1950) 17 *University of Chicago Law Review,* p. 458 *et seq.*; J. E. S. Fawcett, *Some Foreign Effects of Nationalisation of Property,* (1950) 27 *B.Y.I.L.,* p. 371 *et seq.*; A. Drucker, *The Nationalisation of United Nations Property in Europe,* (1950) 36 *Transactions of the Grotius Society,* p. 75 *et seq.*; R. de Neva, *L'esproprio in diritto internazionale,* (1951) 3 *Il Politico,* p. 261 *et seq.,* and J. Gutteridge, *Expropriation and Nationalisation in Hungary, Bulgaria and Roumania,* (1952) 1 *International and Comparative Law Quarterly,* p. 14 *et seq.*

[33] Cmd. 7797–1949.

[34] Cmd. 7600–1949 and 7875–1950.

[35] Cf. Bindschedler, *l.c.* in note 7 above, p. 79 *et seq.,* on the advantages and disadvantages of this method of settling outstanding claims.

(c) *The Anglo-French Agreement of 1951.*[38] Like Belgium, Canada and Switzerland, the United Kingdom accepted compensation to British interests in the French nationalised gas and electricity industries on the same footing as for French citizens. In the event of France subsequently granting more favourable treatment to creditors of any other country, a most-favoured-nation reservation comes into operation. The basis of calculation is *Bourse* quotations on alternative dates in 1944 and 1945. Interest and redemption payments are in French francs, but are subject to an exchange guarantee based on the United States/French franc rate of exchange on April 8, 1946. The capital value of the compensation may be used or reinvested only in France. In consideration for this settlement, and as in the case of all the other global settlements, the Government of the United Kingdom undertook expressly 'not to recognise, nor to bring before any tribunal, nor to support by diplomatic action', any claims which might be made by British nationals under the Nationalisation Law of April 8, 1946. According to private estimates, compensation in these cases amounted to 70 per cent of the value of British holdings in these nationalised properties.

The disturbing fact which emerges from this analysis is that, however put, it was safe after 1945 for any foreign non-enemy

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[36] See, for instance, the statements of Sir Hartley Shawcross, Attorney-General, in the House of Commons on May 8, 1950 (*Hansard*, 5th Series, Vol. 475, col. 64) and by the Lord Chancellor in the House of Lords on June 27, 1950 (*Hansard*, 5th Series, Vol. 167, col. 1114).

[37] Article 12 of the Anglo-Polish Trade and Finance Agreement of January 14, 1949 (Cmd. 7628–1949).

[38] Cmd. 8224–1951. Cf. also Cmd. 8227 and 8358 (1951).

State to nationalise British investments, to sit back in comfort, to receive in due course a British mission and to put the seal on its unilateral action by an agreement which, in effect, deprived British investors of one to two-thirds of their foreign investments. According to a more charitable interpretation, the United Kingdom was magnanimous enough to insist merely on the principle of compensation in case of expropriation, but not on the letter of its rights. Instead, it was content to waive portions of British claims, taking into account equitable considerations such as the general post-war difficulties and the scarcity of foreign exchange in underdeveloped countries.

3. THE ANGLO-IRANIAN DISPUTE

It would be surprising if this generosity in outlook had not played its part in the calculations of the promoters of the Iranian Nationalisation Laws of 1951, enacted exclusively to the detriment of the Anglo-Iranian Oil Company and not forming part of a general programme for nationalisation.[39] In this case, all the issues of principle are neatly raised: the right of a sovereign State to pursue a policy of nationalisation, the effect of treaty obligations in favour of foreign nationals, and the position of property abroad under international customary law and the general principles of law recognised by civilised nations.

(1) *The Right to Nationalise.* In principle, every sovereign State is free to organise its own social and economic system to its own liking.[40] This follows necessarily from the normally unrestricted freedom of independent States in matters of internal jurisdiction. Sovereignty is not, however, an absolute right. It is freedom under international law, and limitations of economic sovereignty may be imposed by treaties, international customary law and general principles of law recognised by civilised nations.

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[39] Direct evidence for the connection between the statement made by the United Kingdom Foreign Secretary in the House of Commons regarding nationalisation in Burma and the Iranian measures of nationalisation is provided by Dr. Moussadek's speech at the meeting of the Majlis on December 17, 1950 (*Informations Iraniennes,* Paris, June 1, 1951, No. 60, p. 4). I am obliged for this reference to Dr. Cheng of this Faculty. See further Cmd. 8425–1951; B. Cheng, *The Anglo-Iranian Dispute,* (1951) 5 *World Affairs,* p. 387 *et seq.,* and J. Frankel, *The Anglo-Iranian Dispute,* (1952) 6 *Year Book of World Affairs,* p. 56 *et seq.*

[40] See, for instance, the statements by Mr. McNeil, Under-Secretary of State for Foreign Affairs, in the House of Commons on December 20, 1945 (*Hansard,* 5th Series, Vol. 417, col. 1691) or by Mr. Bevin on June 17, 1948 (*ibid.,* Vol. 452, col. 657) and below, note 48.

(2) *Limitations by Treaties.* In the case of the Anglo-Iranian Oil Concession of 1933,[41] the right of the Government of the United Kingdom to intervene in the dispute between the Iranian Government and the Anglo-Iranian Oil Company rests securely on the Exchange of Notes on May 10, 1928, between the two countries regarding the Position of British Nationals in Persia after the Abolition of the Capitulations. Over and above other duties of Iran under most-favoured-nation treaties with the United Kingdom,[42] in accordance with this Convention British nationals are to be 'treated on Persian territory in conformity with the rules and practices of international law'.[43] Thus, the pertinent principles of international customary law and the general principles of law recognised by civilised nations are transformed into express treaty stipulations.

(3) *Limitations under International Customary Law and by General Principles of Law.* Nothing that has happened during the inter-war period or since has abrogated the sanctity of private property abroad under international customary law or in accordance with the general principles of law recognised by civilised nations as interpreted by the Permanent Court of International Justice.[44]

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[41] Text in Cmd. 8425–1951, p. 9 *et seq.*

[42] Article 9 of the Anglo-Persian Treaty of 1857 (10 Hertslet's *Commercial Treaties,* p. 949) and Article 2 of the Convention of 1903 (Foreign Office, *Handbook of Commercial Treaties,* 1931, p. 507) in conjunction with, *e.g.,* the Persian-Egyptian Treaty of 1928 or the Belgo-Persian Convention of 1929.

[43] Foreign Office, *Handbook of Commercial Treaties,* 1931, p. 525.

[44] Cf. above, p. 301.

While a certain complacency towards the protection of private property abroad is noticeable among some representatives of the current doctrine of international law (see below, note 46, but against this, *e.g.,* B. A. Wortley, *Expropriation in International Law,* 33 *Transactions of the Grotius Society for 1947,* Part 1, pp. 31–32 and 35; A. N. Makarov, *Nationalisicrungsmassnahmen* in *Um Recht und Gerechtigkeit,* 1950, p. 249 *et seq.*; and E. J. Cohn, *Memorandum on the Application of the German Land Reform Legislation to Property of Non-German Nationals,* 1951), it is reassuring to find in the Report and Recommendations by the Inter-Governmental Group for the Safeguarding of Foreign Interests in Germany, composed of representatives of Benelux, France, the United Kingdom and the United States, the following recommendations (November 10, 1948—21 *Department of State Bulletin,* p. 573, at p. 584, or Cmd. 7850–1949): 'That the Military Governors be directed to adopt or maintain, if already adopted, the policy of preventing or suspending the application to foreign interests in Germany of measures of public ownership, land reform or other taking of property, unless the German government agency concerned has satisfactorily provided for prompt, adequate and effective compensation in conformity with the requirements of international law'.

The United Kingdom recognised this situation when the Labour Government carried out the nationalisation of the British steel industry. It then expressly exempted the American-owned Ford Works at Dagenham from the operation of the Iron and Steel Act.[45]

If governments insist on changing the economic and social structure of their countries beyond the limits of international law they have a double choice. They may desire to continue to be bound by the existing rules of international law. In this case they must accept the implication of this situation and grant to foreign investors the protection due to them under international law or accept the liability of international tortfeasors. The alternative to the submission to the traditional rules of international law is that States decide to carry their social revolution a step further and to break altogether with international law. Then, however, they cease to be subjects of international law. They may form a new system of international law with other States of their particular outlook or re-establish new relations with other subjects of international law on a treaty basis. Yet, unless, and until, these lapses from commonly accepted standards are expressly or tacitly condoned by other States, the international revolutionary has excluded itself from the nexus that links together States which accept the rules of international customary law and the general principles of law recognised by civilised nations.[46]

[45] 1949, Schedule 3, from which the company is omitted as liable to nationalisation; see also Mr. G. R. Strauss, Minister of Supply, in the Standing Committee of the House of Commons, *The Times,* January 28, February 2, 1949.

[46] See for a fuller explanation of this thesis, the present writer's *Die Kreuger-Anleihen,* 1931, p. 39 *et seq.* Only subject to these all-important safeguards regarding the self-exclusion of the lawbreaker from the nexus of international law, it is possible to accept the propositions to be found in Oppenheim's *International Law* (ed. by H. Lauterpacht), Vol. 1, 1948, p. 318.

As Dr. Bindschedler (*l.c.* in note 7 above, p. 17 *et seq.*) rightly points out, no authority is adduced for these propositions, and such authority as there is appears to support more readily the contrary view. The most convincing way in which Professor Lauterpacht's case could be argued would be to hold that the minimum standards of international law are no longer rules of international customary law, but merely general principles of law recognised by civilised nations. In the pre-1914 period, they might have been rules of international customary law, but they lost this character by desuetude (in view of the consistent Anglo-Saxon practice to the contrary, this is hardly tenable). An alternative argument would be that these rules always remained on the level of general principles of

While, in the early twenties, the Soviet Union pragmatically played with both possibilities, the ' revolutionary-legal conceptions of the Russian people ' and more orthodox counter-claims against foreign demands for compensation,[47] the Iranian Government does not appear to desire to make such a fundamental break. It upholds the principle of ' capitalist exploitation ' in favour of other foreign-held properties and, in particular, for the benefit of Persian industrialists and owners of latifundia. Thus, everything else apart, these ' nationalisation ' laws are an act of gross discrimination, and as such a flagrant breach of international law.[48] Yet even on narrower grounds, the same conclusion is unavoidable.

For this purpose, it is necessary to examine more closely the

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law. If, therefore, it were shown that these principles of law were no longer generally recognised by civilised nations, they would cease to be rules of international law. Yet even the Soviet Union recognised the principle of ' full and final compensation ' in the case of the Petsamo Nickel mines (Protocol between Canada and the United Kingdom and the Soviet Union of October 8, 1944—22 *Bulletin of International News* (1944), pp. 939–940). Moreover, whatever view is taken of the treaties concluded between the Eastern and Balkan Communist States, on the one hand, and Western States, on the other, can it be maintained that any of these totalitarian States are civilised nations in any but a completely formal sense of the word?

[47] Cf. J. Degras, *Soviet Documents on Foreign Policy,* Vol. 1, 1951, pp. 98, 124, 130, 138, 191–193, 220–221 (Decree of the Council of People's Commissars on the General and Legal Conditions for Concessions, November 23, 1920), 313–314, 425, 449, 451 and 455–456.

[48] The Note communicated by the Minister of the United Kingdom to the Rumanian Minister for Foreign Affairs on September 7, 1948, is instructive on this point and other matters of principle: ' His Majesty's Government considers that compensation in the form of bonds on the fund of nationalised industry apparently redeemable from the eventual profits of the individual nationalised undertakings, cannot be considered to provide the prompt, adequate and effective compensation which accepted principles of international law require. While His Majesty's Government does not dispute the right of a sovereign power to expropripate interests subject to its jurisdiction and belonging to British subjects, it must, nevertheless, refuse to recognise the validity of such expropriations when they are discriminatory in their nature and effects and when provisions for equitable evaluation and for prompt adequate and effective compensation are not provided by the expropriating Government. In view of the nature of the Rumanian legislation and its application to United Kingdom interests, His Majesty's Government therefore reserves all rights of British subjects and demands either restitution of or prompt adequate and effective compensation for the properties nationalised under that legislation, as also the satisfaction of British financial claims in general, including some £20,000,000 of bonded debts '.

See also A. de La Pradelle, *Les effets internationaux des nationalisations. Projet définitif de Résolutions,* Article 7 (43 *Annuaire de l'Institut de Droit International,* 1950, Vol. 1, p. 127).

position of foreign holders of concessions. This question may be discussed under six headings:

(a) Unless any contrary intention of the parties can be proved, a concession granted by a State to a foreigner is prima facie subject to municipal law. This is the normal situation in the case of State contracts.[49] The presumption is in favour of the municipal law of the grantor.[50] According to the municipal law of most States, concessions are of a mixed character, *i.e.*, pertaining to the spheres of both public and private law. They may be construed as contracts or as unilateral acts.[51]

(b) A concession which has duly come into force is a 'vested private right' of the grantee in the technical meaning given to this term by the Permanent Court of International Justice and is under the protection of international law against unlawful interference on the part of the grantor.[52]

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[49] See further *l.c.* in note 46 above, p. 9 *et seq.*, and *contra* F. A. Mann, *The Law Governing State Contracts,* (1944) 21 *B.Y.I.L.,* p. 11 *et seq.*

[50] Extension of the argument of the Permanent Court of International Justice in the cases of the *Serbian and Brazilian Loans* (1929—A 20/21, pp. 42 and 121–122).

[51] Report of the Transvaal Concessions Commission, 1901, Cd. 623, p. 7; *Affaire de la Cie d'Electricité de Varsovie* (1932) between France and Poland, 3 *United Nations Reports of International Arbitral Awards* (UNRIAA), p. 1679, at p. 1697; *Affaire des Réparations allemandes* (1924) between the Reparations Commission and Germany, 1 UNRIAA, p. 429, at p. 468 *et seq.*; the Franco-Turkish Mixed Arbitral Tribunal in the case of *Régie générale des Chemins de fer et travaux public* c. *Etat turc* (1927) 7 *Rec. T.A.M.*, p. 942, at p. 947. Cf. also H. Mosler, *Wirtschaftskonzessionen bei Aenderung der Staatshoheit,* 1948, p. 65 *et seq.*

[52] See further *l.c.* in note 12 and in note 46 above, pp. 28, 34 and 42–43.

The argument in favour of treating concessions as vested rights is considerably strengthened by the argument *a majori* which can be derived from the protection of concessions even against interference on the part of a successor State in the practice of the Permanent Court of International Justice (cf. the *Sopron-Köszeg Railway Case* (1929), 2 UNRIAA, p. 961 *et seq.*; the case of the *Barcs-Pakrac Railway Company* (1934), 3 *ibid.,* p. 1569 *et seq.,* and *l.c.* in note 12 above, p. 83 *et seq.*).

Difficulties may be thought to arise from the cautious formulation of the principle of the duties of a successor State in certain instances of British State practice and in some judgments of British courts. But from the point of view of international law, the importance of the latter should not be overestimated. They were judgments either in cases in which no foreign plaintiffs were involved or where the courts merely declared themselves incompetent to deal with acts of State. In so far as British State practice is concerned, the *de facto* recognition of the concessions concerned or the actual payment of a fair indemnity are more important than any abstract reservation of principle. Moreover, British representatives were actively associated with the Resolution of the Conference of Ambassadors regarding the maintenance of concessions in

(c) In the case of a concession which is subject to the municipal law of the grantor and not protected by express undertakings against the future exercise of legislative power or of administrative discretion, interference on the part of the grantor is justifiable on the ground of overriding national interest[53]; but only against full, speedy and effective compensation. Otherwise, interference by the grantor is an act of illegal confiscation and entitles the home State of the grantee to demand reparation for the international tort from the grantor.[54]

(d) If, in a concession which, otherwise, is subject to the municipal law of the grantor, the latter promises the grantee immunity from interference by future legislation, such a promise crystallises the relations between the parties on the basis of the municipal law of the grantor as it existed at the time when the concession was granted.

The question arises whether a government or parliament can commit its successors to this extent. That there is no inherent impossibility is shown by the—in principle—unlimited treaty-making power of sovereign States in international law.[55] It is still more generally accepted that the limitation of the exercise of sovereignty by means of treaties is not a negation, but an affirmation, of national sovereignty.[56]

Unless the constitution of a State contains express rules to the contrary, or State organs are limited by generally known rules of constitutional law of this kind, the same argument applies to the exercise of internal sovereignty. The highest organs of a State, which are usually involved in the grant of a concession, must be

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Upper Silesia (October 20, 1921) and with the formulation of the principles laid down in Protocol XII of the Peace Treaty of Lausanne of 1923 (which Protocol, in the view of the Permanent Court of International Justice, was merely declaratory of a general principle of international law—see *l.c.* in note 12 above).

[53] See, for instance, the *Cie générale de l'Orénoque Case* (1905) decided by the Franco-Venezuelan Mixed Claims Commission, *Ralston's Report*, p. 244.

[54] The *Salvador Commercial Company Case* (1902) between Salvador and the United States, *U.S. Foreign Relations*, 1902, p. 838; the *Rudloff Case* (1903), decided by the American-Venezuelan Mixed Claims Commission, *Venezuelan Arbitrations*, 1903, p. 182; the *De Sabla Case* between Panama and the United States (1933), *Hunt's Report*, p. 378, at p. 447; the *Shufeldt Case* (1930) between Guatemala and the United States, 2 UNRIAA, p. 1079, at pp. 1098–1099.

[55] Argument derived from the *Eastern Greenland Case* (1933). See further *l.c.* in note 12 above, p. 67 *et seq.*

[56] Cf. *l.c.* in note 12 above, p. 58.

presumed to act constitutionally and within the limits of their power. If they promise the grantee exemption from future legislative or administrative interference—and especially if the concession is granted for a prolonged period—they do so with full knowledge that they are committing their successors in office. Foreign nationals are not in a position to go behind the word of the highest authorities of the land. *Omnia praesumuntur rite acta esse.*[57]

(e) If, subsequent to the grant of the concession, the same government, or a successor in office, should repudiate its obligations on the alleged ground of the illimitable character of internal sovereignty, this would amount to a clear case of *venire contra factum proprium,* an elementary breach of good faith. Every State has a right to expect that its nationals abroad will be treated in good faith.[58] A State which acts towards foreign nationals in bad faith violates the minimum standards of international law and acts contrary to the general principles of law recognised by civilised nations.[59] Article 21 of the Anglo-

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[57] A valuable argument *a contrario* is furnished by the Opinion of the Commissioners in the *J. E. Davies Case* (1927) between Mexico and the United States (*l.c.* in note 12 above, p. 69). Cf. also the British protest in the case of the *Waring Brothers* (1885) regarding the revocation of an Imperial Brazilian Decree by a subsequent Statute (6 Moore's *Digest of International Law,* 1906, pp. 720–721). For recent instances of the application of this principle by English courts, see *Robertson* v. *Minister of Pensions* [1948] 2 All E.R. 767 and *Falmouth Boat Construction Ltd.* v. *Howell* [1950] 1 All E.R. 538.

Moreover, it is recognised in many municipal legal systems—and the same principle applies in international law—that contractual relations entered into with any government are in fact entered into with the State, of which it is but the organ. The promise given is in fact by the grantor State to the grantee. It is an accepted principle of international law that the continuity of the State is not affected by any change of government whether by election or revolution. For this reason, even obligations assumed by a usurper government are held binding upon subsequent governments. (See *Tinoco Concessions Case* (1923) between Great Britain and Costa Rica, 1 UNRIAA, p. 369; *George V. Hopkins Case* (1926) between the United States and Mexico, *Opinions of Commissioners,* 1927, p. 42.) *A fortiori,* a clause in a concession promising immunity from future legislative interference continues to bind the State in cases where there is a change of government or of the legislature within the ordinary framework of any given constitution.

[58] Cf. the Dispatch of Cass, U.S. Secretary of State, to Lamar, U.S. Minister to Central America, July 25, 1858 (6 Moore *l.c.* in note 57 above, pp. 723–724) and Hyde, *International Law,* Vol. I, 1945, p. 710 *et seq.*

[59] See further B. Cheng, *General Principles of Law in the Jurisprudence of International Courts and Tribunals* (*Library of World Affairs*—in the press) and *l.c.* in note 12 above, pp. 27, 193, 260–261, 372, 396, 436, 471, 474 and 532–533.

Iranian Oil Agreement of 1933 expressly reaffirms the intention of the Contracting Parties to perform the Agreement in good faith.

(f) If the grantor consents to submit the operation of the concession to a legal system other than its own, the position is still clearer. The submission of a concession to the municipal law of a State other than that of the grantor or to international law demonstrates unequivocally the intention of the contracting parties that the concession should not be affected by any subsequent change in the grantor's municipal law, nor be subject to any other form of interference by the State organs of the grantor.

A grantor must be presumed to have authority to subject a concession to foreign municipal law or to international law. A head of State or government has discretionary power to recognise an entity as an international person and to enter into relations with it on the basis of international law. If international law is declared to be the law applicable to a concession, the situation is somewhat similar. For purposes of the interpretation and application of the concession, the grantor agrees to treat the grantee as if the latter had international personality.

From this point of view, Article 22 (f) of the Anglo-Iranian Oil Agreement is of special significance. All differences between the parties are to be settled by the Arbitral Tribunal provided for in the Agreement, and its awards are to be based 'on the juridical principles contained in Article 38 of the Statute of the Permanent Court of International Justice', *i.e.,* on international law. It was, therefore, the intention of the Contracting Parties to remove the Agreement completely from the realm of Iranian municipal law. As the majority of the shares of the Anglo-Iranian Oil Company are held by the Government of the United Kingdom, this assimilation of the status of the Company to that of the United Kingdom was especially appropriate. In any case, any attempt on the part of the Iranian Government to interfere with an agreement subject to international law by subsequent national legislation amounts to a breach of good faith even graver than would have been the case had the Iranian Government merely promised to grant the concession for sixty years and to abstain from any form of legislative or administrative interference with it during this period.

4. THE MEANS OF OBTAINING REDRESS

It is one thing to establish that certain rights under international law are incontestable and another to obtain redress for them. However highhanded the methods of the Greater Powers during the pre-1914 period may have been, and however desirable it is that parties should not take the law into their own hands, the present chances of obtaining redress for justified British claims give no less cause for anxiety.

Three topics call for consideration: the object of international claims, the possibility of judicial determination of disputes, and the limitations imposed by the Charter of the United Nations on self-help.

(1) *The Object of International Claims.* In all cases in which treaty obligations have been broken, minimum standards of international law violated or general principles of law recognised by civilised nations flouted, the duty of the wrongdoer is to make reparation. Primarily, this consists in the restoration of the *status quo ante.* This fundamental principle was clearly established by the Permanent Court of International Justice in the case of the *Chórzow Factory* (1928) between Germany and Poland: ‘The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as is possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, *if this is not possible,* payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law’.[60]

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[60] A 17, p. 47. See further *l.c.* in note 12 above, pp. 204 and 248. Further authority for the view that reparation in international law is by no means confined to monetary compensation may be found in the following cases: in the *W. F. Smith Case* (1929) between the United States and Cuba, in a case of wrongful taking of private property, the tribunal held that ‘it would be not inappropriate to find that, according to law, the property should be restored to the claimant’ (2 UNRIAA, p. 913, at p. 918; cf. also *Junghans Case* (1939) between Germany and Rumania, 3, *ibid.*, p. 1845, at p. 1856). In the *Martini Case* (1930)

Thus, in the case of the Anglo-Iranian Oil Company, the enactment and execution of the Persian laws on nationalisation are the basic illegal acts. Restitution in kind is possible and practical by the repeal of these laws or by an undertaking to undo the harm done by their execution. The question of compensation arises only in a subsidiary way, that is to say, in connection with losses suffered by the Company and its British employees which are not covered by restitution in kind. Loss of profit, the costs involved in the diversion of tankers, in the evacuation of the Company's staff and loss of property through looting or the illegal sale of the Company's oil are in this category.

(2) *Judicial Determination of Disputes.* On the level of municipal law, a State has a wide choice in the judicial remedies which it puts at the disposal of foreign nationals. It must, however, grant some remedy of a judicial or quasi-judicial character for adjudication on alleged infractions of the minimum standards of international law. Otherwise, such a State commits an additional international tort: denial of justice.[61]

In the case of the Anglo-Iranian Oil Concession, a procedure closely modelled on international arbitration is provided by the Agreement of 1933. This replaces the normal remedies. The refusal of the Iranian Government to take part in the constitution of the tribunal, the only judicial remedy available to the Anglo-Iranian Oil Company, is not only an additional act of bad faith, but also an extreme instance of denial of justice. Actually, in the relations between the Anglo-Iranian Oil Company and Iran, provision is made in Article 22 (D) of the Agreement of 1933 for the appointment of a sole arbitrator by the

between Italy and Venezuela, the tribunal ordered '*a titre de réparation, l'annulation des obligations de paiements, imposées à la Maison Martini & Cie*' by a Venezuelan Court (2 *ibid.*, p. 975, at p. 1002).

Like in the case of the Mexican expropriations, the Government of the United Kingdom claimed from the Soviet Union that 'in cases where expropriation of British property in the said areas, or of property in which there is a British right or interest has already taken place, the Soviet Government will ensure that the property, rights or interests are restored to the British owners, or, if this is impossible, that prompt, adequate and effective compensation is paid' (Note of February 23, 1950).

[61] Cf. the intervention of the United States with Venezuela on behalf of the Inter-Continental Telephone Company (1887—Moore, *l.c.* in note 57 above, Vol. 6, pp. 724–725); A. V. Freeman, *The International Responsibility of States for Denial of Justice*, 1938, p. 215 *et seq.*, and *l.c.* in note 12 above, p. 238 *et seq.*

President of the International Court of Justice in case one of the parties does not appoint its arbitrator or does not advise the other party of its appointment, within sixty days of having received notification of the request for arbitration. In May, 1951, the Company asked the President for the appointment of such a sole arbitrator. As, however, the Government of the United Kingdom submitted almost simultaneously its own Application to the World Court, the President of the Court did not take any action in the matter. In law, the two cases remain different, and if the Court should decline jurisdiction in the case between the United Kingdom and Iran, it would still be open to the Anglo-Iranian Oil Company to seek a decision on its complaints by a sole arbitrator to be appointed by the Court.[62]

As Iran has accepted the jurisdiction of the World Court, this might be thought to end the matter. The disturbing fact, however, is that, far from welcoming the interposition of the most authoritative international judicial gremium, most of these ‘ victims of imperialism ’ do everything in their power to avoid international justice being done. It, therefore, is still more necessary than it would be otherwise to make articulate the dilemma with which the Charter of the United Nations confronts law-abiding States.

(3) *Limits of Self-Help.* Under Paragraph 4 of Article 2 of the Charter of the United Nations ‘ all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations ’. The object of this Principle is to close the gap thought to exist in the Covenant of the League of Nations and in the Kellogg Pact, *i.e.*, the continued legality of military measures short of war. The only reservation made in the Charter is under Article 51 in favour of individual and collective self-defence. This, however, applies only in the case of armed aggression. To reintroduce the freedom of States to use military reprisals through the back door would require the specious argument that such measures were not directed against a State's territorial integrity or political independence or that

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[62] Letter of President of the International Court of Justice to the Anglo-Iranian Oil Company (*The Times*, June 2, 1951). Cf. also *l.c.* in note 12 above, pp. 72 and 451.

they were consistent with the purposes of the United Nations as constituting unilateral means of enforcing international justice. As every member of the United Nations would be its own judge in the matter, this would mean reducing Paragraph 4 of Article 2 of the Charter to meaninglessness.

Thus, States like the Eastern European satellites of the Soviet Union may point with mock indignation to this Principle and leave it to their champion in the United Nations to explain that the benefits of this Principle extend even to non-members. States like Albania may even flout with impunity a judgment of the International Court of Justice, and the Soviet Union may justly point out that the Charter provides a procedure, and the only legitimate one, for dealing with such situations: to invoke the procedure under Article 94 of the Charter, *i.e.*, to bring the matter before the Security Council and to await the predestined result: the inevitable Russian veto.

States like Iran may refuse to appoint their arbitrators under concession agreements, tear up such agreements altogether or ignore an Order for interim measures of protection issued by the World Court[63] without fear of retribution and in happy reliance on the limitless patience and law-abidingness of their victims.

From a long-range point of view, it is clear that such States are bound to inflict the greatest harm on themselves; for the independence and territorial integrity of small and weak States rests on the very international law which they do their best to undermine. Moreover, undeveloped States may be able to loot such foreign property that, at present, is within their grasp. Yet no prudent person would invest further capital in countries whose governments have wasted their moral credit. At best, therefore, such countries are condemned to endure the contradictions between the existing starvation level of the masses of their peoples and the luxury of their ruling classes or to face violent social upheavals. At the worst, they tempt other States, which would prefer to abide by the law of the United Nations, to take the law into their own hands. Thus, in a Statement issued on September 29, 1951, the Government of the United Kingdom declared: ' The action of the Persian Government in arbitrarily ordering the expulsion of some 350 British technicians is contrary to the elementary principles of international usage, and has created a situation which might well be thought to justify the use of force in order to preserve the British rights and interests involved. His Majesty's Government would, however, be reluctant to take any action which might have the effect of weakening the authority of the United Nations, on whose principles their policy is based. They have, therefore, decided that the right course in present circumstances is to bring the situation urgently before the Security Council'.

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[63] *Anglo-Iranian Oil Co. Case*, Order of July 5, 1951, *I.C.J. Reports 1951*, p. 89.

Whatever the political reasons may have been which explain the reticence shown by the Government of the United Kingdom in this and other similar cases, it is hardly possible to maintain any longer that the United Kingdom is still under a legal obligation to show such restraint. The behaviour of the small-nation lawbreakers is merely one facet of a more complex phenomenon. With greater rapidity but, otherwise, true to pattern, it repeats the experiences of the inter-war period.[64] The basic East-West Rift has led to a *de facto* revision of the Charter in fields as varied as the admission of new members to the United Nations, the relative position of the Security Council and the General Assembly, the mode of continuing the tenure of the Secretary-General or the conflicting systems of defensive alliances under the escape clauses of Articles 51 and 107 of the Charter.[65]

The persistent lawlessness of countries such as Albania, the former satellites of the European Axis and of Iran throws the doors wide open to an extension of this process of *de facto* revision to cases of wanton breaches of international law short of aggression. If States of this type refuse to comply with international law, to submit controversial issues to the organs expressly provided for this purpose or if they prefer to ignore the findings of such bodies, they lose sight of the reciprocity of rights and duties which alone can make a reality of the self-denying ordinance laid down in Paragraph 4 of Article 2 of the Charter. They will gradually force their victims in future to limit the benefits of this Principle to States which themselves live up to the Purposes and Principles of the United Nations or at least to the minimum standards of international law. The present position makes a mockery both of the United Nations and of international law.

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[64] See further the present writer's *Power Politics*, 1951, p. 303 *et seq.*

[65] *Ibid.*, p. 746 *et seq.* Cf. also section 88 of the *British Commentary on the Charter of the United Nations* (Cmd. 6666–1945); H. Kelsen, *The Law of the United Nations*, 1950, p. 270, and the leading article on *The Use of Force* in *The Times*, October 12, 1951.

5. THE OUTLOOK FOR INVESTMENTS ABROAD

More than ever before, it is necessary in the post-1945 world to see this problem in its wider context.

What was remarkable in the system of power politics as it existed in the pre-1914 period was not that, on occasions, Greater Powers should have abused their superior strength, but the self-restraint shown, in particular, by Great Britain to small defaulting States. All that the weaker nations were expected to do was to observe the existing rules of international law. Even so, small States claimed and obtained protection against the unregulated use of force for the recovery of contract debts. It was, however, wisely provided in Hague Convention II of 1907 that 'this undertaking is not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *Compromis* from being agreed on, or, after the arbitration, fails to submit to the award '.[66]

Under the Charter of the United Nations, these healthy safeguards against small-power lawlessness have been jettisoned. On the assumption of a world directorate exercised by the Big Two, Three or Five—whichever may be preferred—it was possible to go to such length. As it is, the overriding fact in present-day international relations is not world power unity, but the rift between East and West. In this situation, Western States are, of necessity, hesitant to press well founded claims on Eastern satellites or on countries in marginal areas on the frontier between the two worlds. Action against the former may unleash the major conflagration feared by all, and intervention against the latter may lead to Russian counter-intervention or to revolutionary changes in the balance of power within the debtor State and to the establishment of another ' people's democracy '. Thus, in a split world held precariously together by a thinly disguised system of power politics, the Eastern satellites and the countries on the periphery of the Western world have considerable manœuvring space within which they may defy foreign investors without undue risk.

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[66] Paragraph 2 of Article 1. See further, K. Strupp, *Intervention in Finanzfragen*, 1928.

The discussion preceding the conclusion of the Economic Pact of Bogota of 1948 [67] and the meetings of the Human Rights Commission at Geneva [68] show that, even within the Western world, States in the Near and Middle East or in Latin America are hesitant to enter unequivocal legal commitments regarding the protection of foreign-owned private property as distinct from empty protestations of good will in the Universal Declaration of Human Rights. Similar views prevailed even among the members of the Council of Europe. The European Convention for the Protection of Human Rights remains silent on the protection of private property.[69] Thus, the prudent private investor will have a comprehensible tendency to refrain from investments abroad.

In the light of the long-range interests of the Western world, such an attitude, wise as it is from the private investor's point of view, would be a policy of sheer despair. The Western world requires a much higher degree of economic integration. In particular, without considerable foreign investments in the underdeveloped countries, schemes such as the Point Four Programme or the Colombo Plan cannot be implemented. In their present state of adolescent nationalism and, from an investor's point of view, low morality,[70] private investors cannot be advised to run the risk of being *moussadeked*. Yet the problem is urgent and requires a constructive solution. Here international economic lawyers can help. They may leave it to their governments to call the bluff of demands for unsecured assistance based on the all-too-easy argument that if it were not forthcoming, the famous Communist danger would become unmanageable. But they should be able to devise the legal patterns and techniques which will enable the Western world to help these countries to help themselves.

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[67] Cf. U.S. Department of State Publication 3263 (1948), p. 214 and (1948) 2 *International Organisation*, pp. 547–548.

[68] Report of the 7th Session of the Commission on Human Rights, 1951, p. 35 *et seq.* (U.N. Economic and Social Council E/1992. E/CN4/640) and the Record of the 230th meeting, May 7 and 8, 1951 (E/CN4/SR 230 and 231).

[69] Cf. A. H. Robertson, *The European Convention for the Protection of Human Rights*, (1950) 27 *B.Y.I.L.*, pp. 159–160, and L. C. Green, *The European Convention on Human Rights*, (1951) 5 *World Affairs*, p. 437.

[70] Cf. N. MacKenzie (ed.), *The Legal Status of Aliens in Pacific Countries*, 1937, and United Nations, *Foreign Investment Laws and Regulations of the Countries of Asia and the Far East*, 1951.

In this task, two errors will have to be avoided. Precautions must be taken to avoid even any appearance of a new type of 'imperialism'. At the same time, effective guarantees must be worked out against such investments being either a sheer waste of scarce resources or becoming a dead loss.[71] The best way of achieving this end is in the form of investments made by, or under the tactful but firm guidance of, international institutions. As GATT has proved,[72] they alone are in a position to give real meaning and substance to the principle of economic good neighbourliness, the most significant post-war development in the field of the standards of international economic law.

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[71] Cf. International Chamber of Commerce, *International Code of Fair Treatment for Foreign Investments,* 1949, Article 11; W. Reeves and P. D. Dickens, *Private Foreign Investment,* (1949) 64 *Political Science Quarterly,* p. 211 *et seq.*; R. N. Gardner, *Point Four: A Re-examination of Ends and Means,* (1950) 59 *Yale Law Journal,* p. 1317 *et seq.*; G. Hornsey, *Foreign Investment and International Law,* (1950) 3 *International Law Quarterly,* p. 552 *et seq.*; M. Domke, *On the Extra-territorial Effect of Foreign Expropriation Decrees,* (1951) 4 *Western Political Quarterly,* pp. 15–16; United Nations, *Measures for the Economic Development of Under-Developed Countries,* 1951, and C. H. Alexander, *Foreign Investment Laws in the Far East,* (1952) 1 *International and Comparative Law Quarterly,* p. 29 *et seq.*

[72] See further, *The Province and Standards of International Economic Law,* (1948) 2 *International Law Quarterly,* p. 413 *et seq.*

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